MacPherson Report on

Tradition and Education:

Towards a Vision of our Future

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James C. MacPherson
Osgoode Hall Law School
York University

Copies available from:
Department of Indian Affairs and
Northern Development.
Public Enquiries Kiosk
Ottawa, Ontario.
KIA OH4
Telephone Number: (819) 997-0380

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INTRODUCTION

The purpose of this study paper is to review the document published by the Assembly of First Nations in 1988. The document is a four-volume study entitled Tradition and Education: Towards A Vision of Our Future. It is a major study dealing with virtually all aspects of the education of Indians in Canada. The study took several years to complete because the topics to be covered were numerous and often complex. As well, and importantly, Tradition and Education: Towards A Vision of Our Future was based on a comprehensive and admirable process of consultation with scores of local Indian communities throughout Canada. Much of the analysis and many of the recommendations in the study flow from discussions and consultation at this grassroots level.

I have been asked by the Department of Indian Affairs and Northern Development and the Department of Justice to review Tradition and Education: Towards A Vision of Our Future (hence forth simply Tradition and Education). My review will be two-fold in purpose: first, to identify the jurisdictional options in the area of Indian education, with special attention to those options which would result in substantially enhanced Indian jurisdiction over their own education; secondly, to make recommendations about the preferred direction of reforms in this area, including some of the specifics of such reforms.

The context for my review, as I understand it, is that the Department of Indian Affairs and Northern Development (henceforth DIAND) regards Tradition and Education as a substantial and significant document. DIAND is in the process of considering it and wants to respond to it. DIAND intends and believes that its response will be sympathetic and, in many respects, affirmative. However, the ultimate DIAND response will depend, at least in part, on jurisdictional factors and on choosing the right directions and themes and implementing the right substantive reforms. It is these jurisdictional factors, directions, themes and reforms that I have been asked to address -- always, however, in the context of the research, analysis and recommendations contained in Tradition and Education itself.

The remainder of this study paper is divided into six parts. The first three will be relatively brief because much of the information is contained in other studies and documents, including government documents, the academic literature and Tradition and Education. The final three sections of the paper, taken together, will be longer because, in essence, they deal with the questions I have been asked to address. The six sections of the study paper are:

(1) Brief history of Indian education in Canada;

(2) Brief description of the current system of Indian education in Canada;

(3) Brief description and assessment of the systems for native education in several foreign countries;

(4) Discussion of the constitutional framework for native education, and especially Indian education, in Canada;

(5) Identification of reform options;

(6) Conclusions and Recommendations.

I conclude with a final introductory point. Although this study was commissioned by the Department of Indian Affairs and Northern Development with the support of the Department of Justice, the analysis, conclusions and recommendations which follow are mine. They do not necessarily represent either the opinions or policy of DIAND or Justice.

I. HISTORY OF INDIAN EDUCATION IN CANADA

It would be entirely wrong to equate the history of Indian education with the history of the European settlement of Canada. European settlers obviously brought their systems and pedagogies of education with them and these inevitably had a profound impact on the education of the indigenous Indian population. The Indian people, however, had their own system of education long before the arrival of the European settlers. That system has been described in the paper Indian Education (published in 1982 by the Education and Social Development Branch of the Indian and Inuit Affairs Program of DIAND), at Annex C, p.2:

> "When Europeans first came into contact with Amerindian peoples they were able to observe well-established education practices designed to ensure cultural continuity, and through which the youth were provided with the life skills necessary for their future roles in their societies... [T]his period in the history of Indian education was to date, the only period when the training of Indian children was designed, planned and implemented by Indian people for Indian children to prepare the children for the environment in which they were to live."

The contents of early Indian education, uninfluenced by contact with European settlers, has been described by Professor Verna Kirkness in her article Education of Indian and Métis in the book Indians Without Tipis, at p.138:

> Traditional Indian education took a practical form. Children were taught by their parents and grandparents from a very young age. They were taught acceptable social behaviour and the means of survival in an often harsh environment. Girls were taught, among other things, how to prepare and sew garments made of animal hides, how to set up camp, how to prepare food to keep it from spoiling, and how to care for children. Boys were taught to be courageous, skillful hunters. Bravery was admired. Training for the boys and girls in preparation for adulthood was very important... Learning, per se, is not a new concept to Indian people.

From the arrival of the European settlers, first French and then English, to Confederation the central role in the education of Canadian Indians was played by missionaries, especially those from several orders of the Roman Catholic Church. Although some instruction was given in some Indian languages, the core of the education system was European in conception and execution.

Confederation in 1867 gave the federal government jurisdiction, through section 91(24) of the British North America Act, 1867 (now the Constitution Act, 1867) over Indians and lands reserved for Indians. The centrepiece of the federal government's exercise of this jurisdiction from 1867 to about 1950 was the residential school. These schools were located on or near reserves where most Indian children lived. They were run by the churches which in turn received some financial support from the federal government. The theory of these residential schools was segregation -- the education of Indians in separate schools away from the white population. It would be difficult to assess the quality of education received by Indian children at the residential schools. Undoubtedly, some of the missionaries and their staff were sound and dedicated educators producing good students. However, even if this is true, what has emerged in the past year from the misty recesses of time is a tragic story -- for many Indian students in many schools across the country -- of physical, emotional and even sexual abuse. For these students the deep pain in their schoolday lives must have made it virtually impossible to become educated in any meaningful sense.

In about 1950 the federal government radically changed its Indian education policies. Responding to widespread criticisms from the Indian people, the government abandoned its policy of segregation and moved sharply towards a theme of integration of Indian students into the regular provincial school systems. This shift necessitated an increase in the role of provincial and territorial governments, and a reduction in the role of the federal government and the churches, in Indian education. By 1970 well over half of Canada's Indian children were being educated in provincial and territorial schools. Indeed, by 1979 this figure had increased to two-thirds (almost fifty thousand children) even though the stated federal policy of integration of Indian children into the provincial and territorial school systems had begun to shift again by the mid-1970s.

The high water mark of the integration policy and years was probably the White Paper produced by the Government in 1969. Its theme was the elimination of all forms of discrimination against Indians. In the field of education, the White Paper proposed a virtual abdication of federal responsibility to the provinces and territories. In short, the White Paper's proposal was the complete integration of Indian education into the existing provincial and territorial systems.

The reaction of Canadian Indians to the White Paper was, in the federal Government's own words a decade later, "explosively negative". (Indian Education, supra, p.7). Indians pointed out that although the goal of non-discrimination was a worthy one, any constitutional and legislative system that took no account of the historical and contemporary injustices against Indians and did not permit governmental action designed to benefit Indians would simply perpetuate the injustices. Moreover, Indians were worried about, and critical of, the lack of specific attention to Indian education that would, in their eyes, be an inevitable consequence of a complete integration of Indian and non-native education. It was not self-evident to many Indians that improvements in provincial education systems would necessarily be improvements in Indian education because the educational needs of Indian and non-native children were, although shared in some respects, clearly different in others. Integration would mean that less attention would be paid to, and less account taken of, these differences.

Finally, many Indian and other commentators concluded that the policy of integration was simply wrong as a foundation for the education of Indians and, moreover, would not work. I was reminded when reading some of these commentators of the negative reaction in Lower Canada (Quebec) to the 1837 Durham Report which recommended the assimilation of French-speaking Canadians into the English-speaking mainstream. I was also reminded of the end result of the Durham Report -- failure; it didn't work. One of the most eloquent critiques of the policy of integration that I read was made by Walter Currie, a former President of the Indian-Eskimo Association of Canada (see Education of Yukon Indians by the Yukon Native Brotherhood, 1972, p.5):

> Education of Indians has been characterized by a policy of cultural replacement under which the textbooks, the schools, the philosophy of education has been designed to make White men out of Indians. Little attention has been paid to Indian culture, history and language. The result has been a tremendous disillusionment among Indian peoples with the process of education which is creating conflict between parents and children and severe psychological problems for the children involved. In view of these circumstances, Indian parents justifiably feel that the educational system threatens the integrity of their way of life and causes children to become lazy, disobedient and disrespectful of the past. The educational system produces children who are in conflict because they cannot cope with a new way of life.

The reaction of Canadian Indians to the federal Government's 1969 White Paper was not just "explosively negative". The Indian leadership embarked upon a major project designed to formulate and articulate a response to the White Paper. The response was published in 1972 in a paper prepared by the National Indian Brotherhood. That paper, entitled Indian Control of Indian Education, was accepted less than two months later by the federal Government as a basis for its new policy of Indian education. This unusually quick and essentially full acceptance by the federal Government made Indian Control of Indian Education a watershed document in the history of Indian education policy-making and clearly a major reference point for the Assembly of First Nations' 1988 Tradition and Education report. The theme of the new federal policy in 1973 was explicit in the title of the National Indian Brotherhood's paper -- namely, greater control by Indians of the education of their children. The two goals of the new policy, accepted by the federal Government and Canadian Indians, were to reinforce the Indian identity in Indian children (the opposite of assimilation and probably, although not necessarily, of integration) and to provide Indian children with the education and training necessary for making a good living in modern society. The two educational principles for achieving these two goals were, as articulated by the National Indian Brotherhood in 1972 and accepted by the federal Government in 1973, parental responsibility and local control of education.

Local control of education was intended to cover a wide range of education matters, including budgets, identifying school facilities to meet local needs, the operation of the physical plant, staffing (teachers, administrators, support staff), negotiations with other jurisdictions for additional services, the evaluation of educational programs for Indian students both on and off the reserve, counselling services, cultural programs and adult education. The rationale (at least from the Indian perspective) for local Indian control of these and other matters was well-explained by H.A. McCue, the Director of Education of Quebec's Cree School Board, in his 1987 paper Indian Control of Indian Education A Decade and A Half Later, at p.1:

> As I understand it and as those Indian politicians and administrators who were responsible for the 1972 policy paper understood it, the idea of Indian control of our education was to mark the beginning of the emergence of certain aspects of self-government: namely, the control, administration, and development of education models and programs which would be more in step with Indian aspirations in every aspect of social, political, and economic development and, most important, more 'Indian' in curriculum and pedagogy than either the Provincial or Federal school programs which dominated all Indian schools in Canada.

Since 1973 federal policy with respect to Indian education has, in theory, been driven by adherence to the goals and principles of Indian Control of Indian Education. Moreover, in practice there can be no doubt that major and useful steps consistent with this document have been taken. If one compared the 1991 and 1973 pictures in the field of Indian education, one would have to conclude, in fairness, that both parental responsibility for, and local control of, Indian education are much more prevalent today than in 1973. So in that sense there is an element of 'success' about post-1973 developments. Moreover, the completion rate for Indian children at all levels of their schooling, up to and including their post-secondary education, is significantly higher than it was two decades ago. It is both logical and fair, in my view, to conclude that at least some of that success flows from the education policies put in place and pursued by the federal Government in recent years.

Nevertheless, it is also clear that there have been major problems with the implementation of the policy of Indian control of Indian education. Some of the problems which various commentators (Indian, external and even governmental) have mentioned are:

(1) There is no definition of, or agreement about, the notion of 'control';

(2) Indian control so far has often meant nothing more than Indian management (or worse, mere participation in management) of federal programs and policies;

(3) Greater Indian control of education will not lead to better education for Indian children if no provision is made for enhanced support systems and more funding to facilitate the transition;

(4) Greater Indian control of education will not achieve the goal of reinforcing the Indian identity of Indian children if Indian-controlled schools simply mirror the curriculum, programs and policies of provincial schools because of a lack of support and funding necessary for promoting the programs which would encourage Indian distinctiveness;

(5) Experience has shown that equating Indian control with local control is not appropriate in all facets of Indian education.

The federal Government has itself recognized and acknowledged some of the problems listed above. In its 1982 Indian Education paper it explicitly identified some of these problems and discussed them in a way sympathetic to the growing concerns of Indians with the implementation of the 1973 policy. One of the consequences of this recognition by the federal Government that there were serious problems with its policy was its decision to fund a major study of Indian education throughout Canada, the study to be conducted not by the Government or external experts but by the Indian people themselves as co-ordinated by the Education Secretariat of the Assembly of First Nations. The result, in 1988, was the publication of the four-volume study Tradition and Education: Towards A Vision of Our Vision (the first two volumes are the report, the third is an Executive Summary and the fourth a Declaration of First Nations Jurisdiction Over Education).

The methodology underlying Tradition and Education was, as almost always with First Nations people, communitarian. There was, of course, extensive research. This research, however, was not library research; rather it was research grounded in a nationwide process of consultation with Indians in their local communities. In short, the methodology of the report was grassroots (not top-down or expert-driven), consultative (not isolationist) and rooted in the views of Indians themselves (not premised or reliant on the academic milieu). Additionally, it should be mentioned by way of preliminary observation, Tradition and Education clearly builds on the 1972 Indian Control of Indian Education paper prepared by the National Indian Brotherhood. The two papers are, however, quite different in some very important respects, the main one perhaps being that the organizing principle in the 1972 paper was 'control' whereas in Tradition and Education it is 'self-government'.

The starting point of Tradition and Education is an affirmation of the importance of education in the lives of Indian children and an explicit desire on the part of Indians to accept responsibility for, and take control of, this crucial subject matter. These two central points are articulated in the very first paragraph of the study (Vol. 1, p.1):

> Children are the most precious resource of the First Nations. They are the link to the past generations, the enjoyment of the present generations, and the hope for the future. First Nations intend to prepare their children to carry on their cultures and governments. Because education shapes the minds and values of First Nations' young people, it is vitally important that First Nations governments have jurisdiction over the educational programs which have such a lasting impact.

Against this background of affirmation of the importance of education and ambition to assume responsibility for it, Tradition and Education proceeds to a detailed analysis of the quality of Indian education in Canada. The research and documentation in this part of the study, especially in Vol. I, Chapter 4 entitled Quality of First Nations Education, are impressive. A National Review of First Nations Education, drawing on extensive research and consultation in many local Indian communities across Canada, was undertaken. The National Review found a widespread dissatisfaction with the quality of Indian education. To take but one example (an example, however, which shows both research methodology and the serious problems in contemporary Indian education), the study states (Vol. I, p.80):

> The Secondary Research Program received 104 documents that dealt with the topic of student achievement. Retention in lower grades is a common problem among First Nations children. Trends reported by First Nations indicate that children are being held back at the lower primary levels with many repeating grade one. As the students move forward through school, the age-grade deceleration increases. One result of this phenomenon is a high illiteracy rate among First Nations people. Another consequence which many First Nations mentioned is a low completion rate of secondary-level education by First Nations Students.

ONLY 20% OF THE FIRST NATIONS STUDENTS COMPLETE GRADE TWELVE AS OPPOSED TO A NATIONAL AVERAGE OF 70%.

> The statistics underscore the need to improve the facilities, resources, and quality of education for First Nations.
>
> (emphasis in Tradition and Education)

One reason -- a major one -- for statistics like these is, in the eyes of the authors of Tradition and Education, the ineffective implementation of the 1972-1973 policy of Indian control of Indian education. Tradition and Education found virtually no role for Indians in provincial schools and asserts that in federal schools the Indian role is limited to administration of federal policies and programs and does not extend to the planning and development functions.

The solution for the problems in Indian education today, according to Tradition and Education, is not the transfer of jurisdiction from federal to provincial governments. The Indian reaction to this possibility is as negative today as it was in the early 1970s in response to the federal Government's 1969 White Paper (Vol. I, p.69):

> Many First Nations perceive the current DIAND educational policies and practices to be thinly disguised mechanisms for accomplishing a long-range plan to gradually transfer jurisdiction over First Nations education and the federal responsibility for resourcing First Nations education to the provinces and territories.

I do not find this concern and reaction surprising. When it is recalled that the Constitution Act, 1867 assigns jurisdiction over education to the provinces and over Indians and lands reserved for Indians to the federal government, it is only natural to think that the principal focus of provincial law-makers in the area of Indian education will be on education -- i.e. the general education of all children, not just Indian children, in the province. On the other hand, in the same domain of Indian education, a legitimate expectation would be that the focus of federal law-makers would be on Indians; indeed no other focus would be permissible constitutionally.

The way to overcome, or at least ameliorate, some of the problems in Indian education today, says Tradition and Education, is the adoption and consistent implementation of a two-fold solution: first, recognition of federal constitutional responsibility for Indian education; secondly, movement towards Indian self-government, and with it Indian jurisdiction, not just control, over Indian education (and, implicitly, most other areas affecting Indians' lives).

Tradition and Education defines 'jurisdiction' in these terms (Vol. I, p.82):

> The term jurisdiction ... means the rights of each sovereign First Nation to exercise its authority, develop its policies, laws, and control financial and other resources for the education of its citizens.
>
> (emphasis in Tradition and Education)

The words 'each sovereign First Nation' in this definition need to be emphasized. The jurisdiction over Indian education is not to be a monolithic, centralized or national jurisdiction. Rather, it is to be local, community-based jurisdiction. The rationale for this decentralized conception of jurisdiction is (Vol. I, pp.50-51):

> The purpose of local jurisdiction is to allow each community to provide quality education for its citizens in a manner which meets its own needs. Each First Nations government must be able to choose its own method and goals to achieve jurisdiction. Community jurisdiction and autonomy in decision-making are key factors in creating school programs.

In my description of the essential features of Tradition and Education I move now to the final question: how is Indian jurisdiction over Indian education to be established? On that question, Tradition and Education is clear -- the first choice is constitutional amendment, the second choice is federal legislation (Vol. I, p.67):

> The most desirable situation is that there should be a Constitutional amendment explicitly recognizing the inherent aboriginal right of First Nations to exercise self-government. First Nations have always had the right to self-government by virtue of their status as aboriginal nations which governed themselves as sovereign nations long before the formation of Canada. Self-government is both an aboriginal right and a treaty right. It is not delegated authority from the federal government or any other government. Barring a Constitutional amendment, one serious option worthy of debate among First Nations is the possibility of federal legislation that explicitly recognizes, consistent with the Assembly of First Nations' position on the Constitution, the inherent right of First Nations to self-government, particularly with reference to education. This legislation would recognize the right of First Nations to exercise jurisdiction over their education and mandate federal, provincial, and territorial governments to vacate the field of First Nations education.
>
> (my emphasis)

To summarize then: Tradition and Education, published in 1988, is a serious, substantial and important document in the field of Indian education. Some (by no means all) of its major themes and specific proposals are: education is central to the lives of Indian children; accordingly, Indian people want to be responsible for Indian education; the quality of Indian education in Canada today is poor; a major reason for this poor quality is ineffective implementation of the 1972-1973 policy of Indian control of Indian education; increased provincial control over Indian education is not a solution to the current problems in Indian education; part of the solution is recognition of federal constitutional responsibility for Indian education and movement towards Indian self-government; Indian self-government would include Indian jurisdiction over education; this jurisdiction would be exercised at the local community level; Indian jurisdiction over Indian education would be accomplished by, ideally, a constitutional amendment or, failing that, perhaps by federal legislation.

Against the background of this brief description of major historical developments in Indian education, with a particular emphasis on the themes and contents of the Assembly of First Nations 1988 study Tradition and Education, I turn now to a description of the current system of Indian education in Canada.

II. CURRENT SYSTEM OF INDIAN EDUCATION IN CANADA

A. FEDERAL GOVERNMENT

The federal government has the primary responsibility for Indian education in Canada. This responsibility flows from the Constitution Act, 1867 which provides:

> 91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next herein-after enumerated; that is to say...
>
> (24) Indians, and lands reserved for the Indians.

Acting pursuant to this constitutional authority Parliament enacted (and through the years has amended) the Indian Act, a comprehensive statute dealing with many aspects of Indian life. Sections 114-123 of the Indian Act deal with Indian education.

A second source of constitutional authority for the federal government is the so-called 'spending power'. The federal overnment has the constitutional authority to levy taxes, to make laws in relation to public property (property here includes money or revenue), and to appropriate federal funds (Constitution Act, 1867, sections 91(3), 91(1A) and 106 respectively). Acting pursuant to these provisions, the federal government spends substantial amounts of money in areas of provincial jurisdiction. The best example of this practice is the massive federal expenditures in the health care area. A second example is federal contributions to post-secondary education, including the post-secondary education of Indian students. Although one might think that logic would dictate that in a federation each level of government could spend money only within its own areas of jurisdiction (this in fact was the view of Professor Pierre Trudeau: see Federalism and the French Canadians, p.79; he did not act on this view once he became Prime Minister!), in practice it has been widely accepted, by govern- ments and courts, that both the federal and provincial governments can spend their money on anything, including matters within the constitutional jurisdiction of the other level of government: see Hogg, Constitutional Law of Canada (2nd. ed.), pp.123-127.

A third source of constitutional authority for the federal government is the treaties which it entered into with various Indian bands. There are eleven principal treaties and all of them contain provisions about education -- e.g.

> **Treaty #2:** And further, Her Majesty agrees to maintain a school in each reserve hereby made, whenever the Indians of the reserve shall desire it.
>
> **Treaty #3:** And further, Her Majesty agrees to maintain schools for instruction in such reserves hereby made as to Her Government of Her Dominion of Canada may seem advisable, whenever the Indians of the reserves shall desire it.
>
> **Treaty #4:** Further, Her Majesty agrees to maintain a school in the reserve allotted to each band as soon as they settle on said reserve and are prepared for a teacher.
>
> **Treaty #9:** Further, His Majesty agrees to pay such salaries of teachers to instruct the children of said Indians, and also to provide such school buildings and educational equipment as may seem advisable to His Majesty's Government of Canada.

Pursuant to these constitutional bases of authority, the federal government has, through the years, been deeply involved in Indian education. The Government's concentration has been on the education of Indians on reserves. This concentration is made explicit in section 4(3) of the Indian Act which provides:

> 4(3)Sections 114-122...do not apply to or in respect of any Indian who does not ordinarily reside on a reserve or on lands belonging to Her Majesty in right of Canada or a province.

This is an interesting self-imposed limitation. In constitutional terms, it is perhaps not a necessary limitation. It will be recalled that section 91(24) of the Constitution Act, 1867 gives Parliament the power to make laws in relation to Indians and lands reserved for the Indians. It would seem that this wording indicates that there are two subject matters over which Parliament has jurisdiction -- one, Indians and two, lands reserved for Indians. Be that as it may, it is clear that through the years the federal government, at least in the field of education, has collapsed the two into one subject matter, namely the education of reserve Indians.

Against the background of the federal government's constitutional authority in the field of Indian education, I turn to a brief description of its policies and programs as

reflected in the mandate and activities of DIAND. Essentially, the mandate and activities of DIAND can be summarized under five headings:

(1) Federal Schools

Federal schools are schools specifically operated by DIAND. There were ninety-nine of these schools in the academic year 1988-1989. They used to be the centrepiece of the federal government's Indian education policies but their importance decreased dramatically throughout the 1980s as the federal government shifted its emphasis to supporting band-operated schools (see (3) below).

The number of Indian students in federal schools in 1990-1991 was 8,055 (8.7 per cent) down from 21,900 in 1982-1983.

(2) Provincial Schools

Provincial schools are, of course, the mainstay of elementary and secondary education for most Canadian students. They are schools which, generally speaking, are funded by provincial governments and operated by local community-based boards. DIAND enters into agreements (capital and tuition) with the provincial education departments to permit Indian students to attend regular provincial schools. Sometimes individual bands negotiate bilaterally with a provincial school board to achieve the same type of agreement. Although many of these agreements (both DIAND-province and Indian band-provincial school board) might contain provisions about extra or special services that the provincial school will provide to Indian students enrolled there (e.g. cultural, linguistic or remedial programs), I believe it is fair to say that the fundamental purpose of the agreements is to place Indian students in regular provincial schools where they will receive, in essence, the same education as all the other students in these schools. In the academic year 1990-1991 there were 43,545 (47.3 per cent) Indian students in provincial schools, up from 38,500 in 1982-1983.

(3) Band-Operated Schools

Support for band-operated schools represents a major theme of DIAND's education policies in the last decade. DIAND will enter into agreements with individual band councils permitting them to administer all or part of the educational programs for children in their bands. Although the basic curriculum in these schools is usually quite close to the relevant provincial curriculum, an important characteristic of band-operated schools is their use of local Indian resources to supplement the curriculum. The number of students in band-operated schools in 1990-1991 was 40,508 (44 per cent), up from 16,000 in 1982-1983.

When one looks at all three types of schools providing elementary and secondary education to Indian children, it is relatively simple to summarize the developments of the last decade. The enrolment of Indian children in provincial schools has remained almost constant at just under 50 per cent of the total student population. At the same time the enrolment in federal schools has decreased dramatically to 8.7 per cent and been replaced almost entirely by a substantial increase in enrolment in band-operated schools, now 44 per cent.

(4) Post-Secondary Programs

DIAND has established and administers a separate program to provide support to Indian students pursuing post-secondary studies. This program, called the Post-Secondary Student Support Program, provides allowances for tuition, travel and living expenses to students enrolled in CEGEPs (Quebec) or community colleges, undergraduate programs or professional, master's or doctoral programs. In 1988-1989 DIAND spent $122 million to support 15,600 Indian post-secondary students, up from $33 million to support 6,800 students in 1982-1983. Although there are many, many problems for Indian students in virtually every facet of the education system, the increase in Indian enrolment in post-secondary institutions in the last decade is a laudable and hopeful development. I have seen the effects (all good) of this development in my own field (law) and in my own post-secondary institution (Osgoode Hall Law School).

(5) Cultural/Educational Centres Program

DIAND provides financial assistance, under the Cultural/Educational Centres Program, to a large number of Indian bands, tribal and district councils and Indian and Inuit corporations. These funds can be used for programs, courses or activities in the areas of history, language preservation and cultural expression. In the fiscal year 1988-1989 $7,2 million was distributed to seventy-two different cultural/educational centres.

B. TERRITORIAL GOVERNMENTS

In constitutional terms the Northwest Territories and the Yukon Territory are on the same footing as the federal government, not provincial governments. Indeed, the two Territories are entirely under the jurisdiction of the federal government by virtue of section 4 of the Constitution Act, 1867. In reality, however, there are now separate governments in both Territories. In most respects these territorial governments operate like their provincial counterparts. Thus, in the domain of Indian and Inuit education the

programs are not established and administered by the federal government; rather, the territorial governments are, in a de facto way, responsible for the education of all their resident children, including Indian and Inuit children. As it does with provincial governments, the federal government enters into agreements with the territorial governments to enable the latter to provide the appropriate educational services to native children.

The Northwest Territories Education Ordinance has several specific and, in my view, valuable references to the education of native children. Section 15(1) allows the meetings of school authorities to be conducted in the language of the majority of the members who are elected to the authority. Section 34(4) ensures interpretation for such meetings. Sections 17(d) and 22(A) authorize education authorities to institute programs meeting the cultural needs of native students. Part III of the Ordinance deals with the language of instruction. It allows native language instruction to dominate without hampering English instruction and imposes English as a second language instruction on native children. As well, Part III is concerned with ethnic accommodation in the education system. Issues of ethnic accommodation are to be taken into account by local school authorities. These local authorities -- i.e. the committees and boards elected by the voters -- have the responsibility to guide teachers and pupils with respect to the structure and content of the curriculum and in teaching methodology. In all of this there is a place for the notion of ethnic accommodation. Finally, section 96(2)(d) of the Ordinance allows native children to be excused from school in order to participate in traditional native activities on the land or in other learning experiences away from the community.

C. PROVINCIAL GOVERNMENTS

At first blush it might seem that the provincial governments would have the primary authority over Indian education because of section 93 of the Constitution Act, 1867 which provides:

> 93. In and for each Province the Legislature may exclusively make Laws in relation to Education.

However, the combination of section 91(24) of the Constitution Act, 1867 and the eleven treaties between the federal government and various Indian bands have left no doubt that the constitutional authority over Indian education resides with the federal government. That has not meant, however, that the provinces do not play a very substantial role in this domain. That role has been well-described by H.A. McCue in his paper Indian Control of Indian Education A Decade and A Half Later, at p.23:

> Historically, the role of the provinces in Indian education has been much more active than most people believe despite the commonly-held notion that Indian education is a federal responsibility. In many critical areas such as the training of teachers and school administrators for Indian schools, the school curriculum, the organization of the school academic program, the material used to evaluate students, and the selection of texts and teaching materials, the role of the provinces in Indian education has been dominant to the role of the federal government. And with one or two notable exceptions most provincial Education ministries ignore the needs of Indian education and continue to direct Indians to the Federal government for assistance despite the large role they actually perform.

The substantial role of provincial governments in the education of Indian students flows from section 114 of the Indian Act which provides:

> 114(1) The Governor in Council may authorize the Minister, in accordance with this Act, to enter into agreements on behalf of Her Majesty for the education in accordance with the Act of Indian children, with
>
> (a) the government of a province....

Acting pursuant to this provision, the federal government has entered into tuition agreements with the relevant education authorities in every province in Canada. These tuition agreements, on either a province-wide or individual board basis, commit the provincial education authorities to provide, in return for financial compensation, basic education to Indian students within the relevant provincial or local jurisdiction. An illustrative example is the Canada-British Columbia Master Tuition Agreement, some of the key provisions of which are:

> Whereas Canada and British Columbia recognize the aspiration of Indian communities towards achieving control and responsibility for the education of their children...
>
> 4. British Columbia has agreed by its policies that the public schools will enroll Indian students and provide such students with the same educational opportunities, instruction and materials as it provides to non-Indian students enrolled in the public schools, while taking into consideration any special needs or requirements that such Indian students may have;

5. British Columbia recognizes the goal of parity for native Indian students as a major priority. Parity will be achieved when native Indian students enjoy the same level of success in the public schools as all other students. Indicators of parity may include reference to assignment scores, graduation and student retention rates;...

7. Canada and British Columbia agree that linguistic and cultural differences exist between Indian and non-Indian students that may require extra support to enable Indian students to succeed in school.

D. ROLE OF INDIANS

In the three previous sections, dealing with the role of federal, territorial and provincial governments in Indian education, my discussion commenced with constitutional considerations -- i.e. an identification of the actual and potential bases of authority in the Constitution (essentially, but not entirely, the Constitution Act, 1867) for the Indian education laws and programs of the three levels of government.

There can be no similar starting point in this part of the paper because the role of Indians in the domain of education does not have a basis in any of the traditional Canadian constitutional documents. (I will discuss other possibilities in Part IV of this paper.) Accordingly, any role that Indians play in the education of their young people is based on the sufferance of the three levels of government. This is deeply frustrating to Canadian Indians; indeed this frustration is one of the dominant and most visible themes running throughout Tradition and Education.

Although almost half of all Canadian Indians are educated in provincial schools, it appears that the role of Indians in the formation and implementation of education policy in most Canadian provinces is almost non-existent. There have been some promising developments in recent years -- the philosophy underlying (and perhaps some of the actual experience of) the Quebec Government -- Cree School Board relationship, the growth in the number of tuition agreements being negotiated not by the federal and provincial governments but rather by individual bands and neighbouring provincial school boards, and the existence and role of Indian advisory committees to provide advice to local school boards and provincial education authorities, to name a few. These developments, however, operate at the margins of provincial education laws, policies, programs and administration. The reality is that for almost fifty per cent of Canadian Indians enrolled in provincial schools they receive essentially the same education as their non-native classmates. This may, in many cases, be an excellent education. However, it is an education that is not built on the participation of Indians themselves. It is also, therefore, an education that takes little account of the different history and traditions, different contemporary social factors, and different needs and even aspirations of many Canadian Indians.

The picture in federal and band schools is better, but there are still many serious problems. For over a decade now the explicit policy of the federal government in the domain of Indian education has been devolution. The philosophy and some of the general consequences of this policy are well-described in Tradition and Education, at p.129:

> Devolution is the policy of the federal government to devolve, over time, responsibility for the delivery of programs and services to the First Nations. It does not include any legislative or administrative changes and, more importantly, devolution does not incorporate an increase in funding levels for the programs involved. In the education area, devolution focuses on transferring the federal elementary and secondary schools from DIAND control into First Nations schools under the jurisdiction of the First Nations. The funding arrangements for these new First Nations schools is similar to the funding of the currently operating First Nations school. Funding is determined and allocated using a formula and the actual payment of funds is governed by the contribution process which applies to all DIAND programs. Devolution also encompasses the transfer of First Nations students from provincial schools to First Nations-controlled schools. This will result in fewer students being funded by tuition agreements between the First Nations or DIAND and the provinces or their school boards. By increasing enrollment in First Nations schools through the transfer of students, the funding of affected First Nations schools should increase.

This description of devolution is confirmed in several recent documents emanating from DIAND. The 1990-1991 Estimates, Part III, Expenditure state, at pp.1-3:

> The Department's principal emphasis over the next few years will be on:
>
> - developing Indian community-based initiatives on self-government
> - strengthening the capacity and flexibility of Indian governments to design and deliver services and programs consistent with community needs and priorities through alternative and new comprehensive funding arrangements with interested bands

- continuing the transfer of programs and responsibilities to Indian bands and territorial governments

And in the Program Circular dealing with Education Policy the following is found:

> 2.2 The general principles of (a) parental responsibility and (b) local control as outlined in the N.I.B. policy paper "Indian Control of Indian Education" shall be followed wherever practical and desirable in the provision of kindergarten, elementary and secondary education services to status Indian children whose parents live on reserve or crown lands.

The actual consequences of the policy of devolution can be seen in DIAND's Annual Report for 1988-1989, under the heading Education Branch, p.17:

> Twenty bands assumed control of 23 schools during the year, increasing to 285 the number of on-reserve schools operated by band authorities. The number of federally operated schools was reduced to 99. Almost 30,000 students were enrolled in band schools, twice as many as in federal schools. During the same period, 18 bands received pre-takeover funding for future school transfers.

Although devolution has almost certainly been, in terms of policy, a good development it suffers from the major problem that the exercise of authority over education by Indians has no independent constitutional foundation. Devolution has almost certainly led to greater Indian participation in the area of Indian education. There is even, in some respects and in certain locales, Indian control (at lease de facto control) over Indian education. This participation and control, however, are dependent on the acquiesence, the sufferance of Canadian governments, especially the federal government. Whereas the roles of federal, territorial and provincial governments are roles grounded in jurisdiction, including constitutional jurisdiction, the role of Indians is not similarly grounded. From the perspective of Canadian Indians, as articulated in Tradition and Education, this is the major problem in Indian education today. The direction of some government policies, especially the federal government's policy of devolution, may be useful and some of the specific policies may have been improvements over previous policies. However, the separation of these directions and policies from jurisdictional considerations in favour of grounding them in simple governmental fiat is, in the eyes of Canadian Indians and the authors of Tradition and Education, both illogical and unfair -- illogical because participation and control, if they are to be meaningful, should flow from jurisdiction or power; unfair because Canadian Indians are well-positioned to create, develop and effectively implement their own educational policies and programs.

E. CONCLUSIONS

I will conclude my description of the current system of Indian education in Canada by listing, in summary form, my sense of the improvements that have happened in the last decade and the major problems that remain. I would mention three in each category.

On the improvements or progress side of the ledger I would suggest that there is now a great deal of useful information about the current system of Indian education in Canada and, more importantly, about the impact of that system on Indian students. Some of that information comes from the records, studies and reports of DIAND. A great deal of additional information comes from Tradition and Education. In an earlier part of this paper I was complimentary about the research methodology that animates Tradition and Education. I want to re-emphasize this point; one of the great values of the report is that it is grounded in so much detailed, and individualized, information drawn from Indian communities across the nation. In short, Tradition and Education establishes a fine base of factual information on which Canadian Indians and DIAND should be able collectively to build.

The second item on the progress side of the ledger is the policy and practice of devolution. It is my impression that Tradition and Education and DIAND agree on the essential components of the definition of devolution, agree on its appropriateness as the centrepiece of modern education policy, and, moreover, agree that important steps have been taken, in many bands throughout the country, to implement the policy. I also have formed the impression that the relevant parties are agreed that, on the whole, devolution has made for a better education system for Indians than the previous system of complete federal control with virtually no central or localized role for the Indian people.

Thirdly, it is clear that the education system has improved for many Indian children in the last decade. The increase in the number of students proceeding to, and successively completing, each of junior high school, high school, college, university and other forms of post-secondary education is both impressive and hopeful. The numbers are not anywhere near where all Canadians would want them to be -- and where in time they must be. This does not detract, however, from the fact that significant progress has been made.

On the other, problematic, side of the ledger I would also list three matters. All of them are, in my view, very serious problems which cry out for analysis and,

especially, action, preferably joint action by relevant governments and the appropriate representatives of Canada's native communities.

The first problem I would mention is confusion about jurisdiction over Indian education. There is a constitutional framework which appears to grant a role in the area of Indian education to federal, provincial and territorial governments and no role to Indians themselves. The existence of the government/Indian line and the blurring of the federal/provincial/territorial lines are a source of confusion, disappointment, frustration and anger for Canadian Indians and, I suspect, for the governments as well. Clarification of, and changes to, the constitutional framework are urgently needed.

Secondly (and this flows in part from the first point) federal policy in the Indian education area is skeletal, incremental and, in many respects, lacking in coherently articulated foundations or premises. One has only to look at sections 114-123 of the Indian Act, the statutory root of federal Indian education policy, to see that these adjectives are not misplaced. These provisions are exceptionally skeletal and vague and paint almost no picture of the organizing principles, key substantive policies or important processes of Indian education. And below these statutory provisions the picture is not much clearer. Federal policy must be searched for in a bewildering array of other laws, subordinate laws, policy directives and individual agreements (both inter-governmental and government-Indian band). Moreover, a good portion of federal policy cannot be found anywhere; it just happens depending on who might be involved in a particular matter at a particular time in a particular locale.

The third problem, in my view, is the lack of a meaningful role at a formal level (including, perhaps, a constitutional level) for Indians in their own education system. That is perhaps the dominant theme of Tradition and Education; its authors assert, with real feeling, that the time has come for the foundations of Indian education to rest with Indians themselves. I agree with them.

I will return in detail to these three problems in Parts IV, V and VI of this paper. For now, I simply identify them as the three problems which, in my view, urgently require attention and solutions.

III. NATIVE EDUCATION IN OTHER COUNTRIES

In many other countries there are substantial numbers of aboriginal or native citizens. In every case these citizens were 'first' citizens in the sense that they lived alone in the particular countries, sometimes for centuries, long before European-based settlers discovered and began to live in the countries. In every case the mixing of European settlers with the original native groups has created serious problems, especially for the native groups who have been forced, sometimes through the weight of numbers, often through simple force, to adjust -- indeed to lose -- some of the essential features of their ancestral way-of-life.

This process of forced adjustment and loss has been present in the area of education in these countries. Indeed, the imposition of European models of education on native people has often been one of the driving forces of the forced adjustment and loss in these countries. Accordingly, I thought it might be useful to describe, very briefly, the education systems for native people in three countries - New Zealand, Australia and the United States. My description will attempt to do two things -- first, provide a sense of the history and current state of native education in these countries; secondly, identify positive features (if any) of the system of native education in these countries with a view to seeing whether they might usefully have a place in the Canadian education system.

A. NEW ZEALAND

New Zealand is a unitary state and therefore has no formal jurisdictional conflicts about either education or native peoples. New Zealand's natives, called Maoris, were present in New Zealand for centuries before Europeans began to settle in the 19th century. By the Treaty of Waitangi, signed in 1840 by the Maori chiefs and Lieutenant Governor William Hobson, the Maoris ceded sovereignty to the Crown in return for protection and guaranteed possession of their lands. The Maori also agreed to sell their land only to the Crown.

In the field of education the dominant theme historically was the attempted assimilation of Maori children into the majority European population. For much of the 20th century the process of assimilation was hastened by two major factors, one sociological, the other educational. The sociological factor was rural poverty and increasing urbanization which together impelled many young Maori to move to the cities where they quickly lost contact with their linguistic, cultural and community Maori roots. The educational factor was the lack of a distinct education system for Maoris coupled with an absence in the mainstream education system of any accommodation for Maori history and contemporary values. In the words of Joan Metge in The Maoris of New Zealand, at p.156:

> Recent reports have shown growing appreciation of the fact that the New Zealand school system as it has existed up to the present is almost entirely monocultural, based on a set of assumptions and principles about child development and the aims of education that have been developed in, and to serve the needs of, Western societies.

There have been, however, some promising developments in Maori education in recent years. In 1956 the State Department of Education, which since the Native Schools Act, 1867 has had special responsibility for the education of Maoris, established a special Division of Maori and Island Education with two sections dealing with the education of Maoris and Islanders in New Zealand and education in New Zealand's island territories. The New Zealand section is supported by the National Advisory Committee on Maori Education which must have at least fifty per cent Maori membership. The Committee meets yearly to produce a Report on Maori Education in which recommendations are presented to the Minister of Education.

The most interesting development in Maori education is one that began just a decade ago in 1982 -- the Kohanga Reo (language nest) program. This is a language renewal program for pre-school Maori children. It is a community-based program which uses a culturally sensitive approach to language education in an attempt to promote the everyday use of the Maori language and to promote Maori cultural values.

There are now over 500 Kohanga Reos in New Zealand and they are attended by approximately fifteen per cent of Maori pre-school children. The program receives extensive state funding and assistance from the departments of Education, Social Welfare, Health and Labour, although responsibility for operations has increasingly been transferred to tribal authorities themselves. Most Kohanga Reos are located at a Maori-owned premise (often a facility that combines the pre-school program with youth and adult programs) and involve a great deal of community participation. The personnel at Kohanga Reos consists of paid supervisors chosen on the strength of their Maori skills, trainees from the Department of Labour and volunteer parents, grandparents and older children. Daily administration and long-term planning and budgeting are performed by a parent-controlled managing committee. There is also a Te Kohanga Reo Trust Body made up of respected Maori leaders whose role is to work with government agencies to obtain political and financial support.

It seems to me that the Kohanga Reo program is important for a number of reasons. (I should add that I visited two Kohanga Reos in their first year of operation in 1982 and was very impressed with the concept, the detailed planning that underlay the two schools I visited, the manifest and genuine support for the concept, and the enthusiasm in the two local Maori communities.) First, the program is aimed at pre-schoolers and therefore has the chance to establish the Maori language and culture with children before the assimilation of the regular school system sets in. Secondly, the concept of education in the Kohanga Reos is a broad one, combining language, culture, history and traditions. Thirdly, and importantly, the program is very community-based. Maori leadership, Maori teachers, Maori volunteers, parents and grandparents all play pivotal roles in the design, long-range planning and daily operation of the schools. The Kohanga Reo program is, in a very real sense, a Maori program although, in a formal sense, it is a government program. Fourthly, the government has provided strong support, including substantial financial support, to the program.

My impression is that the Kohanga Reo program successfully incorporates Maori cultural values and community organization into the New Zealand education system. This is good for the Maori children because it provides them with a more relevant and, I suspect, more comfortable early education. It is also good for the Maori communities because it imposes a responsibility or trust on them to devise and operate programs for their own children in the most important field for those children -- education. And finally, it is probably good for New Zealand because it diminishes the traditional monocultural emphasis of New Zealand schools and society. The Kohanga Reo program represents, I think, an important effort by Maoris to redefine their aboriginal status in modern New Zealand and a parallel respect, and support for, this Maori effort by the New Zealand Government. It could well, therefore, be a catalyst for parallel changes in the rest of the New Zealand education system. Equally, because of its important themes and organizing principles -- early education, community design and participation, broad notion of education, genuine government support -- it is worthy of careful study in a Canadian context.

B. AUSTRALIA

Australia, like Canada, is a federal country. Education is a subject matter within state jurisdiction. Prior to the creation of the Commonwealth in 1900 each colony exercised jurisdiction over aboriginals. The separate states retained this jurisdiction after 1900. The consequence of the assignment of both education and aboriginals to state governments has been described by R.K. Harker and K.B. McConnochie in Education As Cultural Artifact, at p.96:

> Any description of Aboriginal education is complicated by the lack of any centralized control at the national level. However, despite some variation in policy at state level, the outcome has been depressingly similar everywhere, so that it is true to say that for most of the 200 years of white occupation of Australia, most Aboriginal children have not been offered an adequate education. Indeed, large numbers of Aboriginal children have not had any access to education at all.

Aboriginal education in Australia since 1900 can be divided into two periods -- pre-1950 and post-1950. The first period has been succinctly summarized by Harker and McConnochie, supra, at p.101:

> The period from the 1860s to the 1940s was one of neglect in Aboriginal affairs generally and in Aboriginal education in particular. Aborigines were hidden away in separate custodial institutions, under white control and highly restrictive legislation which excluded them from the rights, privileges and responsibilities of Australian citizenship. The majority of teachers were unqualified, inexperienced and over-loaded with other administrative duties which placed them in the role of policemen rather than teachers. Education was conducted in inadequate and ill-equipped buildings, following a programme which at best fitted them for poorly paid seasonal work, and whichprovided no possibility for movement out of this situation. Aboriginal children were refused admission to the white school system and in many instances received no education at all.

This early policy of ignoring aboriginals gave way in the 1950s and 1960s to a policy of assimilation. Aboriginal children were placed in state schools and were expected to follow the regular school curriculum. The philosophy in the various state school systems was, in essence, that the aboriginal children had to adjust to the mainstream education system, not vice versa. Not surprisingly, the 1950s and 1960s saw little improvement in the education achievement of aboriginal children. According to Harker and McConnachie, at p.104:

> While the structure for assimilation had been achieved, it became increasingly clear that this was not accompanied by any substantial improvement in the educational attainments of Aboriginal children. Not only were achievement levels low, but absenteeism was

high, and the children were leaving school early, with few or no educational qualifications.

In the last two decades the picture has improved, but only somewhat. An important development on the constitutional front was the constitutional amendment in 1967 rescinding the previous prohibition against the federal government making laws in relation to aboriginals. Thus, the subject matter of aboriginals is no longer one of exclusive state jurisdiction; rather it is a concurrent power with federal paramountcy.

This constitutional change has led to some, albeit very limited, national initiatives in aboriginal education. Most significantly, the official government policy of assimilation has been abandoned. This has led to an increase in aboriginal involvement in education matters. A National Aboriginal Education Committee has been formed to provide advice to the federal government. As well, aboriginal education consultative groups work closely with the National Committee to provide advice to state governments and education agencies. Some of the innovative programs in aboriginal education that have been proposed and in some cases introduced in recent times are independent aboriginal schools, aboriginal family education centres, the Aboriginal Task Force (an aboriginal social worker trainee scheme operating at the South Australian Institute of Technology), aboriginal enclave programs in colleges providing special entry and support for aboriginal trainee teachers, out-station schools located in decentralized communities, aboriginal-controlled pre-schools (like New Zealand's Kohanga Reos) and bilingual programs in regular schools attended by aboriginal children.

In spite of these developments the sad reality is that the situation for most Australian aborigines is truly abysmal. In almost every facet of everyday life, including education, Australian aborigines are treated worse and are in poorer shape than their Canadian counterparts. My impression, based on my research and on a visit in 1982 to the Australian outback, is that, to put it bluntly, Canada has very little to learn from the Australian experience.

Interestingly, one of the consequences of the failure of Australian government policy with respect to its aboriginal population has been a growth in agitation for self-government. In this respect the Australian experience in the 1980s mirrors one of the dominant themes of Tradition and Education. In the early 1980s the National Aboriginal Conference began to pursue a Makarrata or compact with Australia which would redefine the aborigine-settler relationship. The Conference sought a recognition of self-government and the right in each tribal territory to determine its own political, economic, social and educational development. This position received the support of the Senate Standing Committee on Constitutional and Legal Affairs which recommended a constitutional amendment by public referendum to authorize the Commonwealth to enter into such a compact. (It hasn't happened yet.)

The pressure for aboriginal-controlled school systems is linked to this movement for self-government. The desire for aborigines to control their own futures and the futures of their children is increasingly being given voice by younger, more politically active aborigines. A crucial component of this sovereignty or control, in their eyes, is the right to establish and operate their own school systems.

C. UNITED STATES

The history of Indian education in the United States has been an unhappy one. The situation may not be as bleak as in Australia. However, in spite of the great emphasis American politicians (e.g. President Bush in his inaugural address and several other speeches since becoming President) and ordinary Americans place on education, the system of Indian education in the United States is very poor. Indeed, it was only twenty years ago that a special United States Senate Subcommittee on Indian education characterized the state of Indian Education as a "national tragedy".

It is unfortunate, and perhaps surprising, that the American system of Indian education should be such a failure. I say surprising because the constitutional arrangements in this field are very different from those in New Zealand and Australia and indeed Canada. They are also, in my view, theoretically more attractive for the Indian people and, therefore, one might hope, would lead to better education policies and results. Alas, this appears not to be the case.

There is, in U.S. constitutional law, the notion of self-government for the Indian people. Its sources and contents have been described by Edward Morgan in his article Self-Government and the Constitution: A Comparative Look at Native Canadians and American Indians (1984), 12 American Indian Law Review 39 at 42:

> The numerous aboriginal groups collectively referred to as American Indians represent an anomaly in the United States' constitutional order in that they are to a large extent self-contained and self-governing entities insulated from the encroachment of the state in which they are situated. The unique legal position occupied by Indian tribes traces its source to the 1832 decision of Chief Justice John Marshall in Worcester v. Georgia, in which

it was held that Indians retained their historic character as a distinct political community of a 'national character'. The case represents a further elaboration on Marshall's assertion the preceding year that the relationship between the United States and American Indians is 'perhaps unlike that of any other two people in existence'. Although the term 'foreign nation' was perceived as 'with strict propriety, applicable by either to the other', the Indian tribes were labelled 'domestic dependent nations' that sit in relation to the United States as 'a ward to a guardian'.

These last words, 'as a ward to a guardian', are important because early in the jurisprudence of the United States courts the notion of self-government was transformed by a guardian-ward overlay. The result was that Indians became subject to federal, but not state, laws. As described by Morgan, at pp.43-44:

> The Indians were seen as grouped together in self-governing units within the United States, immune from all state control but subject to federal jurisdiction when exercised.
>
> In terms of the division of powers embodied in American federalism, it is clear that although tribal sovereignty was recognized at a relatively early stage as a juridical fact of life, the sovereign authority of the federal government allows for a considerable scope of powers over Indian affairs. As articulated in the case law, the primary source of federal authority in this regard is constitutional, emanating in the main from the executive war- and treaty-making powers and congressional jurisdiction over commerce. Additionally, the notion of the tribe's exclusive authority over its own territory has, since the inception of American Indian rights jurisprudence, been perceived as limited by the doctrine of federal ownership of Indian-occupied lands. Thus, to a great extent the dependency of the otherwise sovereign tribes on the United States government, as expressed by Marshall, was seen as resulting from the conception of Indians residing on their territories at the sufferance of the title holder, whose unassailable proprietary interest derived from the right of discovery exercised by the colonial forerunners of the present federal state. The combined impact of the federal government's constitutional and proprietary jurisdiction, therefore, is to establish a congressional plenary power serving to temper the expression of tribal sovereignty.

Acting pursuant to its powers, much of the history of the federal government's involvement in Indian education can be summarized in two words -- neglect and assimilation. Neglect is the word to best describe the federal policies until about the 1870s. In the years up to that decade missionaries of various denominations sought to 'Christianize' and 'educate' Indian children. The federal government was happy to let this happen and did not play, therefore, an active role in Indian education. After the 1870s, with the opening of the American West, the role of missionaries receded. The federal government established its own schools, often boarding schools, for Indians. The education they received, however, was not tailored at all to their separate history and contemporary needs; rather it was simply 'white' education taught to Indians in segregated facilities. In this century, the locale of education for many Indians changed -- many of them started to attend regular schools. The contents of education, however, did not change; no allowances were made for Indian distinctiveness. The 1944 Report of the House of Representatives Select Committee on Indian Affairs is probably typical: "The goal of Indian education should be to make the Indian child a better American rather to equip him simply to be a better Indian".

In recent years, the federal government has modified its policy emphasis to some extent. Drawing on the long-standing constitutional anchor of self-government Congress enacted the Indian Self Determination and Education Assistance Act in 1975. The declaration of policy underlying the Act states;

> The Congress hereby recognizes the obligation of the United States to respond to the strong expression of the Indian People for self-determination by assuring maximum Indian participation in the direction of education as well as other federal services to Indian communities....
>
> Prolonged federal domination of Indian service programs has served to retard rather than enhance the progress of Indian People. True self-determination in any society of people is dependent upon an educational process which will ensure the development of qualified people to fulfil meaningful leadership roles. Parental and community control of educational process is of crucial importance to the Indian people.

Perhaps in response to this law there has been some good movement in the last decade in some parts of the country towards the development of community-based and controlled Indian schools. The initiative for these schools has usually developed in native communities themselves rather than in either state education bureaucracies or the Federal Bureau of Indian Affairs. However, my impression is that this motif is simply a small backwash in the dominant tide of education policy. As in so many other areas of

American life, the melting pot theme controls and, in the area of Indian education, results in little distinctive education for Indian children. I suspect that the following description of Indian education in the mid-1970s is still, by and large, valid (Dean Chayes, Indian Education: Failure for the Future? (1974), 2 American Indian Law Review 61 at 62-63):

> The laws governing the federal system of Indian schools and the practice by the government of subsidizing the education of Indians who attend public schools represent what may be the most unwieldy, least well-planned, and least coordinated body of law in the United States. Although these laws are intended to regulate a social system with one of the most ambitious aims in Western European education -- a system designed to change the culture of a people in toto - there are inconsistencies in them which work at cross-purposes with the declared goals. They seem in many ways to be designed to alienate the people they are supposedly designed to help, and their effect in too many cases is to produce graduates who are ill-equipped 'to live in' either the white man's world or the Indian's; some 50 per cent of the students drop out before graduation from high school.
>
> The outstanding characteristic of these laws is that they are formulated, administered, and adjudicated by outside agencies, agencies foreign to the Indian tribes themselves. This colonial aspect is true not only in education, but in the entire field of Indian affairs. From an original intention not to interfere in internal tribal matters, the Congress moved to a position of absolute power over Indian affairs, using its plenary authority under the Constitution. Although this absolute control was lessened in the 1930s, the federal government controls Indian education almost completely; Indian parents have little or no control over the process, and neither do duly constituted tribal governments...
>
> The present body of laws are a patchwork collection of political and ideological purposes, largely reflecting a frontier ethic. The laws are administered by the Bureau of Indian Affairs, an agency foreign to the political structures of the tribes. This agency has the sole power -- including wide discretionary power -- over Indian education. It is the Bureau officials who carry out the policy, who administer the schools, who hold the purse strings, and whom many Indians view as their natural enemy, the representative of the 'white man'.

In short, the actual operation of Indian education systems in the United States is quite poor, just as it is in Canada. Accordingly there is not a great deal that Canada could usefully learn from American policies or the American experience with Indian education.

What is interesting and potentially of value, however, is the American constitutional and legislative framework. The concept of Indian self-government, drawing on treaties, the Constitution and the notion of trusteeship is an important part of that framework. Granted, it has been re-interpreted (some might say interpreted away) in favour of federal, but not state, jurisdiction.

Nevertheless, it has existed in American constitutional jurisprudence for more than a century and a half and it appears to have been accepted as a natural and normal part of that jurisprudence. Moreover, the Indian Self Determination and Education Assistance Act indicates that it is also accepted in the legislative realm. In short, the notion of self-government for native people does not scare politicians or judges. If that is the case in the United States, a nation where cohesion and uniformity are not only accepted but prized, it may say something useful and hopeful to Canadians who recognize and respect so much more diversity than the Americans. If the concept of Indian self-government has an explicit and accepted place in the United States Constitution and in federal legislation, a similar constitutional and legislative arrangement in Canada should not seem startling, unnatural or bizarre.

IV. CONSTITUTIONAL FRAMEWORK FOR NATIVE EDUCATION IN CANADA

Canada is one of the few federations in the world -- that is, it is a nation with powers divided between two separate, independent and co-equal levels of government. Federations by their very nature often pose difficult and tricky problems because both levels of government, responding to public pressure and purporting to act pursuant to their own constitutional powers, will try to enact laws in the same, or at least a similar, field. In late 20th century Canada, where laissez faire conceptions of government seem to be out of fashion and where governments respond to public demands by enacting more and more laws and regulations, the potential for overlap, duplication, confusion and conflict grows.

Moving from the general to the specific, in Canada the field of Indian education suffers from jurisdictional confusion and conflict. This is because the Constitution does not assign the subject matter of Indian education exclusively to either the federal or the provincial governments. Section 91(24) of the Constitution Act, 1867 gives Parliament the exclusive jurisdiction to make laws in relation to "Indians and lands reserved for Indians". On the other hand, Section 93 gives the provincial legislatures exclusive jurisdiction to make laws in relation to "education". Both levels of government, acting pursuant to these grants of power, have enacted many and diverse laws dealing with, respectively, Indians and education. Additionally, both levels of government have created very large bureaucracies to administer their laws, policies and programs. Given the two-pronged distribution of powers in the Constitution with respect to Indian education, and given the number and contents of the laws enacted by both levels of government, and given the size and entrenched nature of the federal Indian and provincial education bureaucracies, it is not surprising that the theoretical confusion and conflict that characterize many aspects of a federation are, in the context of Indian education, a real and substantial confusion and conflict.

This reality of confusion and conflict in the field of Indian education raises questions that lie at the heart of this paper. What is the scope of the federal government's constitutional power over Indian education? What is the jurisdiction of the provincial governments? How much overlap and duplication is constitutionally permitted? If there is a conflict between federal and provincial laws, which takes precedence and to what extent? I will attempt to answer these pivotal jurisdictional questions in this part of the paper. In order to do so I will address two topics -- first, the general principles of Canadian constitutional 'federalism' law; secondly, the interpretation that the courts, especially the Supreme Court of Canada, have given to Parliament's power under section 91(24) of the Constitution Act, 1867 over Indians and lands reserved for Indians and to the power of the provincial legislatures under section 93 of the Constitution Act, 1867 to make laws concerning education.

A. FEDERALISM -- GENERAL PRINCIPLES

(1) Exclusivity

The theoretical fundamental principle of Canadian constitutional 'federalism' law is exclusivity -- that is, the principle that each level of government is assigned powers by the Constitution Act, 1867, that those assigned powers are separate and different from the powers assigned to the other level of government, and that only the government assigned a power can exercise it.

The principal basis for the doctrine of exclusivity is the wording of sections 91, 92 and 93 of the Constitution Act, 1867. These are the three main power-conferring provisions in that document and all of them use the words 'exclusive' or 'exclusively':

> 91. the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next herein-after enumerated; that is to say, -- ...
>
> (24) Indians, and Lands reserved for Indians.
>
> 92. In each Province the Legislature may exclusively make laws in relation to Matters coming within the Class of Subject next herein-after enumerated....
>
> 93. In and for each Province the Legislature may exclusively make Laws in relation to Education....
>
> (my emphasis)

There is also strong case authority for the principle of exclusivity. Perhaps the most famous and colourful was the statement by Lord Atkin on behalf of the Judicial Committee of the Privy Council (our highest court until 1949 when the Supreme Court of Canada replaced it at the apex of the judicial system) in Attorney General (Canada) v. Attorney General (Ontario) (Labour Conventions Case), [1937] A.C. 326 at 354: "while the ship of state now sails on larger ventures and into foreign waters she still retains the watertight compartments which are an essential part of her original structure." By 'watertight compartments' Lord Atkin meant exclusivity, the idea of a clear and distinct division between federal and provincial powers.

A more recent illustration of similar judicial reasoning is the unanimous decision of the Supreme Court of Canada in Bell Canada v. Commission de la santé et de la sécurité du travail (Quebec) (1988), 51 D.L.R. (4th) 161. In that case the issue was whether a Quebec occupational health and safety law applied to the employees of Bell Canada, a business under federal jurisdiction. Quebec argued that its law did apply to Bell's employees because labour relations is a provincial responsibility and that an overlap between federal (business) and provincial (labour relations) jurisdiction was permissible. Quebec's argument was that many subject matters have two 'aspects', one federal and one provincial, and that both federal and provincial laws with respect to these subject matters should be allowed to stand provided there is no actual conflict between the laws. Justice Beetz rejected this argument; he stated, at p.172:

> However, in A.-G. Can. v. A.-G. Alta. ... Viscount Haldane issued a warning about the double aspect theory. This is what he said about this theory ... : " ... [it] is now well established, but none the less ought to be applied only with great caution...".
>
> The reason for this caution is the extremely broad wording of the exclusive legislative powers listed in ss.91 and 92 of the Constitution Act, 1867 and the risk that these two fields of exclusive powers will be combined into a single more or less concurrent field of powers governed solely by the rule of paramountcy of federal legislation. Nothing could be more directly contrary to the principle of federalism underlying the Canadian Constitution: see Laskin's Canadian Constitutional Law, 5th ed. (1986), vol. I, at p.525.
>
> The double aspect theory is neither an exception nor even a qualification to the rule of exclusive legislative jurisdiction. Its effect must not be to create concurrent fields of jurisdiction, such as agriculture, immigration and old age pensions and supplementary benefits, in which Parliament and the legislatures may legislate on the same aspect. On the contrary, the double aspect theory can only be invoked when it gives effect to the rule of exclusive fields of jurisdiction.
>
> (emphasis in original)

(2) Colourability

A second important doctrine in Canadian constitutional law is colourability. This doctrine provides that neither level of government can intrude into the jurisdiction of the other by an indirect or disguised or 'colourable' law. Professor Peter Hogg in his book Constitutional Law of Canada (2nd ed.) has described the doctrine and the most recent case applying it in these terms, at p.322:

> The courts are, of course, concerned with the substance of the legislation to be characterized and not merely its form. The "colourability" doctrine is invoked when a statute bears the formal trappings of a matter within jurisdiction, but in reality is addressed to a matter outside jurisdiction....
>
> In Re Upper Churchill Water Rights (1984), the Supreme Court of Canada struck down a Newfoundland statute that expropriated the assets of a company that generated hydro-electricity at Churchill Falls in Labrador. On the face of it, the statute seemed valid, because it was clear that Newfoundland had the power to expropriate property situated within its borders. But the Court held that the pith and substance of the statute was to deprive the company of the capacity to fulfil a long-term contract to supply power to Hydro-Quebec at below-market rates. The nullification of this contract was outside the power of Newfoundland, because the contract created rights in Quebec. The statute made no mention of the power contract or of any rights outside the province, and was thus "cloaked in the proper constitutional form". The statute was nevertheless held to be invalid as "a colourable attempt to interfere with the power contract".

The doctrines of exclusivity and colourability impose important constraints on the law-making functions of federal and provincial governments. The doctrine of exclusivity, when applied, diminishes the degree of overlap between federal and provincial laws. Thus, in the field of Indian education, if the doctrine of exclusivity is applied, a province would have to take care to ensure that its law was substantially an education law (permissible) and not an Indian law (not permissible). Similarly, if the doctrine of exclusivity was applied to a federal law the key question would be whether the law was substantially an Indian law rather than an education law.

The doctrine of colourability provides a second, albeit different, constraint on legislative powers. In the field of Indian education, the question with respect to a federal law would be: is this really a law whose primary subject matter is Indians, or is it a law which artificially, dishonestly or disingenuously has education as its primary subject matter? For a provincial law dealing with Indian education the question would be the converse: is this really an education law, or is it a disguised 'Indian' law?

The doctrines of exclusivity and colourability might give rise to the impression that it is difficult for both levels of government to make laws in an overlapping federal-provincial field like Indian education. Indeed one might fear that the doctrines might create a 'no man's land' where no government could legislate --the provinces because their Indian education laws would intrude into federal jurisdiction over Indians, and the federal government because its Indian education law would intrude into provincial jurisdiction over education. Fortunately, this is not the case because there are other constitutional doctrines competing with the doctrines of exclusivity and colourability. These competing doctrines allow a fair amount of legislative leeway and lead to a large degree of overlap between federal and provincial laws. It is to these competing doctrines that I now turn.

(3) Presumption of Constitutionality

The first doctrine on this side of the scales is the presumption of constitutionality. By this I mean that if a province enacts a law in the field of Indian education, the starting point would be a presumption that it is justified under the provincial education power. Similarly, if Parliament enacted a law in the same field, the starting point would be that it is valid under the federal power to make laws in relation to Indians and lands reserved for Indians. The Supreme Court of Canada has recently restated this principle in Re Nova Scotia Board of Censors et al. and McNeil (1978), 84 D.L.R. (2nd) 1 at 20:

> In all such cases the Court cannot ignore the rule implicit in the proposition stated as early as 1878 by Mr. Justice Strong in Severn v. The Queen ... that any question as to the validity of provincial legislation is to be approached on the assumption that it is validly enacted. As was said by Fauteux, J., as he then was, in the Reference re Farm Products Marketing Act (1957)...
>
> "There is a presumptio juris as to the existence of the bona fide intention of a legislative body to confine itself to its own sphere and a presumption of similar nature that general words in a statute are not intended to extend its operation beyond the territorial authority of the Legislature."

It should be observed that although this passage refers explicitly to a presumption in favour of the validity of provincial laws there is no doubt that the presumption applies with equal force to federal laws.

(4) Aspect doctrine

The second doctrine which supports the validity of both federal and provincial laws is the aspect or double aspect doctrine. It is a very long-standing and particularly important constitutional doctrine. Indeed, it is probably the most important doctrine in Canadian constitutional law. It was stated for the first time in Hodge v. The Queen (1883), 9 App. Cas. 117 at 130: "subjects which in one aspect and for one purpose fall within s.92, may in another aspect and for another purpose fall within s.91". It has been applied in many, many cases by both the Privy Council and the Supreme Court of Canada (see recently, for example, Multiple Access Ltd. v. McCutcheon et al. (1982), 138 D.L.R. (3d) 1, where identical federal and Ontario securities provisions were both upheld -- the federal provision because it had a federal company aspect, the Ontario provision because it had a provincial corporate securities aspect). What the aspect doctrine could potentially mean for federal and provincial laws in the Indian education domain is this: a federal law, provided it was honestly directed at Indians, would be found to have a federal aspect and would be valid; the provincial law, provided it was a genuine education law, would be found to have a provincial aspect and would also be valid.

It is true that in a major recent decision, Bell Canada, the Supreme Court cautioned against extending the aspect doctrine so far that it overturns the notion of exclusivity (see discussion above at pp.20). However, this caution does not detract from the fact that for over a century the aspect doctrine has resulted in a tremendous number of federal and provincial laws being upheld. Viewed from the perspective of governments, the doctrine is exceptionally useful because it means that most of the laws they enact are upheld. However, one of the consequences of the doctrine is that if both levels of government decide to legislate in the same field, and both laws are independently upheld because of the aspect doctrine, the potential for duplication, overlap, confusion and even outright conflict is heightened. That would be a distinct possibility in the field of Indian education if both governments enacted laws without co-operating with each other and the courts upheld both sets of laws under the aspect doctrine.

(5) General laws/Incidental application

A third constitutional doctrine, of special but not exclusive relevance to provincial laws, is that a law of general application can apply to subject matters under the other level of government's jurisdiction provided that the law is firmly grounded in the constitutional jurisdiction of the government enacting it. Another doctrinal way of expressing the same point is that a law firmly grounded in the constitutional jurisdiction of the government enacting the law can have an 'incidental effect' on subject matters within the jurisdiction of the

other level of government. Professor Hogg has collected most of the case authorities which lend support to this third doctrine in his book Constitutional Law of Canada, at pp.314-315:

> It is important to recognize that this... doctrine enables one level of government to enact laws with substantial impact on matters outside its jurisdiction.... There are many examples of laws which have been upheld despite their "incidental" impact on matters outside the enacting body's jurisdiction. A provincial law in relation to insurance (provincial matter) may validly restrict or even stop the activities of federally-incorporated companies (federal matter); a provincial law reorganizing municipalities (provincial matter) may validly alter the interest payable on debt owed to out-of-province creditors (federal matter); a federal law in relation to navigation and shipping (federal matter) may validly regulate labour relations in a port (provincial matter); a federal law in relation to the national capital region (federal matter) may validly regulate land use in Ontario and Quebec (provincial matter).

The decisions of the Privy Council (before 1949) and Supreme Court of Canada permitting these and other extensions of the application of laws into subject matters within the jurisdiction of the other level of government are: Workmen's Compensation Board v. C.P.R. [1920] A.C. 184; Lymburn v. Mayland [1932] A.C. 318; Ladore v. Bennett [1939] A.C. 468; Johanesson v. West St. Paul [1952] 1 S.C.R. 292; Stevedores Reference [1955] S.C.R. 529; Attorney General (Ontario) v. Barfried Enterprises [1963] S.C.R. 570; Oil, Chemical and Atomic Workers v. Imperial Oil [1963] S.C.R. 584;

Munro v. National Capital Commission [1966] S.C.R. 663; Carnation Co. v. Quebec Agricultural Marketing Board [1968] S.C.R. 238; Walter v. Attorney General (Alberta) [1969] S.C.R. 383; Canadian Indemnity Co. v. Attorney General (British Columbia) [1977] 2 S.C.R. 504; Attorney General (Quebec) v. Kellogg's of Canada [1978] 2 S.C.R. 211; Construction Montcalm v. Minimum Wage Commission [1979] 1 S.C.R. 754; and Four B Manufacturing v. United Garment Workers (1979), 102 D.L.R. (3d) 385 (this case involved theapplication of Ontario's labour law to a company on an Indian reserve; it will be discussed below).

(6) Conflict/Paramountcy

The three doctrines I have just discussed -- the presumption of constitutionality, the aspect doctrine and the general laws/incidental application doctrine -- all lead to laws, both federal and provincial, being upheld. In divided fields like Indian (federal jurisdiction) education (provincial jurisdiction) the result of the application of these doctrines is that both federal and provincial laws dealing with a single subject matter will be upheld by the courts. In terms of democratic theory this is good because it is unfortunate in a democracy for non-elected courts to overturn decisions reached by the elected representatives of the people. Moreover, judicial affirmation of the laws of both levels of government in a single field will also be fine on the merits provided the two laws mesh co-operatively or at least do not collide with each other. Nevertheless, in a federation when both legislatures enact laws in the same field and when the courts uphold those laws the spectre of confusion and conflict is raised. The question then arises: when do federal and provincial laws collide -- i.e., what constitutes a conflict between federal and provincial laws? (**Note**: The Constitution provides that if there is a conflict the federal law is paramount -- i.e., it is the provincial law which must give way.)

The answer to this question is that the Supreme Court of Canada has been very restrained about saying that there is a conflict between a federal and a provincial law. The leading case is Multiple Access Ltd v. McCutcheon, (1982), 138 D.L.R. (3d) 1, where the Supreme Court of Canada, applying the aspect doctrine, upheld identical provisions in federal and Ontario securities laws and then concluded that there was no conflict between the two laws. The Court spoke of the nature of conflict between federal and provincial laws in these terms, at pp.23-24:

> I would say that duplication is, to borrow Professor Lederman's phrase, "the ultimate in harmony". The resulting "untidiness" or "dis-economy" of duplication is the price we pay for a federal system in which economy "often has to be subordinated to... provincial autonomy"... Mere duplication without actual conflict or contradiction is not sufficient to invoke the doctrine of paramountcy and render otherwise valid provincial legislation inoperative....
>
> In principle, there would seem to be no good reason to speak of paramountcy and preclusion except where there is actual conflict in operation as where one enactment says "yes" and the other says "no";; "the same citizens are being told to do inconsistent things"; compliance with one is defiance of the other.

If one applies the Multiple Access concept of actual conflict to the field of Indian education, there would not be a conflict simply because Parliament and a provincial government enacted laws in relation to this subject matter. Indeed, if the two laws were identical they would both survive under the express holding of Multiple

Access. A conflict would arise, bringing with it survival of only the federal law because of the principle of federal paramountcy, only if it were impossible for the citizen to obey both laws. The impossibility of compliance with both laws is what constitutes actual conflict. To illustrate, if the Indian Act said that all students in band schools had to attend school from Tuesday - Saturday and could not attend school on Sunday and Monday, but the Nova Scotia Education Act said that all students in all Nova Scotia schools had to attend school from Sunday - Thursday and could not attend school on Friday and Saturday, that would be an actual conflict. It is impossible for the Indian student to obey both laws. The federal law would be paramount and the Indian student would have to obey it.

(7) Conclusions

In a federation, constitutional law is never simple, straightforward and clear. Nevertheless, the basic principles of constitutional interpretation in the Canadian federation point, for the most part, in the same direction. The word I would use to capture that direction is 'flexibility'. The Canadian courts have been very restrained in exercising their role as umpire of the Canadian federalism system. Although the doctrines of exclusivity and colourability have posed some constraints on the federal and provincial governments, these constraints are but an undertow against the dominant tide of judicial interpretation. That tide is moved along by the presumption of constitutionality, the aspect doctrine and the general laws/incidental application doctrine, all of which tend to result in both federal and provincial laws being upheld. Moreover, if there are two laws, one federal and the other provincial, dealing with the same subject matter the very restrained judicial definition of conflict has tended, in almost every case, to permit both laws to survive and operate.

What all of this means for jurisdiction in the domain of Indian education is this: the general principles of interpretation of the Canadian constitution establish a theoretical starting point of broad and substantial jurisdiction for both the federal and provincial governments in the field of Indian education.

Theoretically, federal laws will be upheld because they will be 'Indian' laws and provincial laws will be upheld because they are 'education laws'. And if a federal law and a provincial law seem to cover the same area, theoretically they will both be permitted to stand because there will not be an actual conflict.

I turn now to consider whether this theoretical starting point of plenty of room for both federal and provincial laws dealing with Indian education is in fact true. In order to test the theory and the reality I need to move from general constitutional analysis to a specific analysis of constitutional law relating to the federal subject matter of Indians and to the provincial subject matter of education.

B. FEDERALISM -- INDIANS AND EDUCATION

By virtue of section 91(24) of the Constitution Act, 1867 the federal government has jurisdiction to make laws in relation to Indians and lands reserved for Indians. Under section 93 of the Constitution Act, 1867 provincial legislatures can make laws in relation to education. It follows that both levels of government can potentially legislate in the field of Indian education. This possibility makes it necessary to consider how the courts, especially the Supreme Court of Canada, have defined and interpreted the federal Indian power and the provincial education power and to extrapolate from the relevant cases the likely scope of federal and provincial jurisdiction in the specific field of Indian education. I will turn to these issues now; by way of preliminary comment, however, I would say that the probable scope of federal jurisdiction over Indian education is fairly simple to describe whereas the probable scope of provincial jurisdiction is significantly more difficult to describe.

(1) Federal Jurisdiction -- Section 91(24) of the Constitution Act, 1867

Section 91(24) of the Constitution Act, 1867 gives Parliament jurisdiction to make laws in relation to Indians and lands reserved for Indians. The first point to note is that there are two subject matters in this provisions -- Indians and laws reserved for Indians. This point was affirmed in the important case Four B Manufacturing Ltd. v. United Garment Workers of America (1979), 102 D.L.R. (3d) 385, wherein Justice Beetz said, at p.399:

> Section 91(24) of the British North America Act, 1867 [now the Constitution Act, 1867] assigns jurisdiction to Parliament over two distinct subject-matters, Indians and lands reserved for the Indians, not Indians on lands reserved for the Indians.
>
> (emphasis in original)

This interpretation of section 91(24) has important implications for federal jurisdiction over Indian education. It means that the federal government could, if it wanted, enact a law or laws dealing with the education of all Indian children wherever they live.

A second important question of interpretation relating to section 91(24) of the Constitution Act, 1867 is the definition of the word 'Indian'. The federal Indian Act defines 'Indian' for purposes of that Act. The definition is grounded in Indian status derived from band

membership. Accordingly, most of the provisions of the Act (dealing with such diverse subject matters as possession of lands in reserves, the surrender of reserve lands, wills, the distribution of property on intestacy, mental incompetence, the administration of property of infant children, loans, schools and enfranchisement) relate to reserve Indians. Indians covered by the Indian Act are known as status Indians.

There are, of course, other categories of Canadian natives. Although they are not included within the definition of Indian in the Indian Act (indeed one category, the Inuit, are explicitly excluded from the definition: see section 4(1)), it does not follow that these categories are not potentially subject to federal jurisdiction under section 91(24) of the Constitution Act, 1867. The potential constitutional position of non-status Indians, Métis and the Inuit has been well-summarized by Professor Hogg in his text, at p.553:

> [T]here are also many persons of varying degrees of Indian blood and culture who are outside the statutory definition. These "non-status Indians" are also probably "Indians" within the meaning of s.91(24), although they are not governed by the Indian Act. The Métis people, who originated in the west from intermarriage between French Canadian men and Indian women during the fur trade period, received "half-breed" land grants in lieu of any right to live on reserves, and were accordingly excluded from the definition of Indian in the Indian Act. However, they are probably "Indians" within the meaning of section 91(24). The Inuit or Eskimo people are also outside the reserve system, and are therefore not covered by the Indian Act definition, but they have been held to be "Indians" within the meaning of s.91(24). The Parliament is, of course, under no obligation to legislate to the full limit of its authority, and, with respect to Indians, it has certainly not done so: non-status Indians, Métis and Inuit are not governed by the Indian Act or otherwise regulated by federal legislation.

Professor Hogg says that the Inuit "have been held to be Indians within the meaning of s.91(24)" of the Constitution Act, 1867. He is referring here to the important decision of the Supreme Court of Canada in Re Eskimos [1939] 2 D.L.R. 417. The question in this reference case was: "Does the term 'Indians' as used in Head 24 of s.91 of the B.N.A. Act, 1867 include Eskimo inhabitants of the Province of Quebec?" The Supreme Court gave an affirmative answer to this question. Chief Justice Duff said, at p.428:

> Nor can I agree that the context (in head no.24) has the effect of restricting the term "Indians". If "Indians" standing alone in its application to British North America denotes the aborigines, then the fact that there were aborigines for whom lands had not been reserved seems to afford no good reason for limiting the scope of the term "Indians" itself.

There is another reason why, in 1991, it is likely that federal jurisdiction under section 91(24) of the Constitution Act, 1867 could extend to all natives, not just to the Indians covered by the Indian Act. That additional reason, a new one, is section 35 of the Constitution Act, 1982:

> 35(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

Professor William Pentney, in his article The Rights of the Aboriginal Peoples of Canada and the Constitution Act, 1982 (1988), 22 U.B.C. Law Rev. 207, has written about section 35(2) in these terms, at p.261:

> The purpose of s.35(2) then is to define, by broad category, the aboriginal peoples of Canada in order to clarify that the rights of the Indians, Inuit and Métis people are within sections 25 and 35.

Admittedly, the broad definition of aboriginal peoples in section 35(2) of the Constitution Act, 1982 (a definition that equates Indians, Métis and Inuit in order to protect their rights) does not control the definition of Indian for federalism purposes under a different constitutional document, the Constitution Act, 1867. However, I would suggest that the symmetry in section 35(2) of the Constitution Act, 1982 builds on and is consistent with the judicial and academic interpretation of the definition of Indian in section 91(24) of the Constitution Act, 1867.

What all of this means, in my view, is that although Professor Hogg is right to assert that "Parliament is, of course, under no obligation to legislate to the full limit of its authority" it does not follow that Parliament could not legislate much more broadly than it has thus far. To be specific, it is my view that section 91(24) of the Constitution Act, 1867 would permit a comprehensive national law dealing with the subject matter of Indian education, that this law could cover any and all aspects of Indian education, including academic and vocational and from pre-school to university, and that this law could cover any and all categories of Canadian natives -- status and non-status Indians, Métis and Inuit. I do not feel a need to qualify or limit this opinion; in my view, the wording and interpretation of section 91(24) of the

Constitution Act, 1867 would easily support a comprehensive national law dealing with Indian education.

(2) Provincial Jurisdiction – Section 93 of the Constitution Act, 1867

There is no doubt that section 93 of the Constitution Act, 1867 is a broad source of provincial jurisdiction in the education domain. Its breadth is underlined by the fact that section 93 itself contains four explicit qualifications on, indeed subtractions from, provincial jurisdiction which gives rise to an inference that no other qualifications were contemplated by the Fathers of Confederation. Nevertheless, it is obvious that provincial jurisdiction over Indian education is not automatic or absolute. Education is a provincial responsibility, Indians are a federal responsibility. Accordingly, although there may well be provincial jurisdiction over the subject matter of Indian education, the scope or reach of this jurisdiction needs to be considered in light of established principles of constitutional interpretation.

The starting point for my analysis is the proposition, discussed earlier (see pp.21-23), that provincial laws of general application can apply to federal subject matters. This proposition applies in the domain of Indian education for two reasons -- first, constitutional doctrine; secondly, section 88 of the Indian Act.

The leading case on the constitutional doctrine point is Cardinal v. Attorney General of Alberta (1974), 40 D.L.R. (3d) 537 (S.C.C.). In that case the question was whether the Alberta Wildlife Act applied to a treaty Indian selling moose meat to a non-Indian on a reserve. The Supreme Court answered this question affirmatively. Justice Martland said, at pp.559-560:

> But it is also well-established that provincial legislation enacted under a heading of s.92 does not necessarily become invalid because it affects something which is subject to federal legislation.
>
> A provincial Legislature could not enact legislation in relation to Indians, or in relation to Indian reserves, but this is far from saying that the effect of s.91(24) of the British North America Act, 1867, was to create enclaves within a Province within the boundaries of which provincial legislation could have no application. In my opinion, the test as to the application of provincial legislation within a reserve is the same as with respect to its application within the Province and that is that it must be within the authority of s.92 and must not be in relation to a subject-matter assigned exclusively to the Canadian Parliament under s.91. Two of these subjects are Indians and Indian reserves, but if provincial legislation within the limits of s.92 is not construed as being legislation in relation to those classes of subjects (or any other subject under s.91) it is applicable anywhere in the Province, including Indian reserves, even though Indians or Indian reserves might be affected by it. My point is that s.91(24) enumerates classes of subjects over which the federal Parliament has the exclusive power to legislate, but it does not purport to define areas within a Province within which the power of a Province to enact legislation, otherwise within its powers, is to be excluded.

The Cardinal-type analysis was reaffirmed by a majority of the Supreme Court of Canada in Four B Manufacturing Ltd. v. United Garment Workers of America (1979), 102 D.L.R. (3d) 385, in which the majority of the Court held that the Ontario Labour Relations Act was applicable to a shoe factory on an Indian reserve. Speaking of the general rule that a provincial law of general application can apply to federal subject matters, Justice Beetz stated at pp.398-399:

> A similar reasoning must prevail with respect to the application of provincial laws to Indians, as long as such laws do not single out Indians nor purport to regulate them qua Indians, and as long also as they are not superseded by valid federal law....
>
> The enclave theory has been rejected by this Court in Cardinal v. A.-G. Alta. ... and I see no reason to revive it even in a limited form.

And even more recently, the Supreme Court again confirmed this approach to the application of provincial law to Indians in Jack and Charlie v. The Queen (1985), 21 D.L.R. (4th) 641, another case in which a provincial wildlife law was held to apply to Indians.

The second strong basis for the application of provincial laws of general application to Indians is section 88 of the Indian Act which provides:

> 88. Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act.

Although this is a provision conferring quite broad powers on provincial governments, it is subject to some explicit and important qualifications. Professor Brian

Slattery, in his article Understanding Aboriginal Rights (1987), 66 Can. Bar Rev. 727, has described both the significance of section 88 and its limitations, at p.778:

> This, then, is the general scheme that results from the division of powers under the Constitution Act, 1867. However, the operation of the scheme is significantly affected by section 88 of the federal Indian Act.... This section gives force to provincial laws of general application that would otherwise be invalid in their application to Indians. It achieves this result by incorporating them into federal law. The laws incorporated are subordinated to the terms of "any treaty", "any other Act of the Parliament of Canada", and the provisions of the Indian Act and its attendant legislation. The section does not refer to the common law rules governing aboriginal rights. It follows that these rules can be overridden by provincial statutes adopted as federal law.

If one applies the constitutional doctrine and section 88 points just discussed to the field of Indian education, a fair conclusion would be that there is a wide scope for provincial jurisdiction in this field. There are, however, some important qualifications on the general constitutional doctrine lending support to provincial jurisdiction. Some of these are not relevant in the field of Indian education; others, however, are potentially quite relevant.

The first, and probably most important, qualification is the doctrine of 'singling out'. I said above that the Supreme Court of Canada has consistently held, as a general proposition, that provincial laws of general application can apply to federal subject matters. However, provincial laws that deal separately with -- i.e. single out -- federal subject matters are not constitutional, even though they may appear to be well-grounded in a head of provincial power. In Four B Manufacturing Justice Beetz stated and applied the general proposition but explicitly qualified it with the phrase "as long as such laws do not single out Indians".

The leading 'singling out' case in the context of the relationship between provincial laws and Indians is Regina v. Sutherland (1980), 113 D.L.R. (3d) 374 (S.C.C.). In that case the issue was the constitutionality of section 49 of the Manitoba Wildlife Act which provides:

> 49. For all purposes in respect of the hunting or killing of wildlife, land set aside or designated as
>
> (a) a refuge;
>
> (b) a provincial recreation area;
>
> (c) a provincial forest;
>
> (d) a wildlife management area; or
>
> (e) a community pasture;
>
> under this Act or under any other Act of the Legislature shall be conclusively deemed to be occupied Crown lands to which Indians do not have a right of access for purposes of exercising any rights bestowed upon them under paragraph 13 of the Memorandum of Agreement approved under the Manitoba Natural Resources Act.

The Supreme Court of Canada struck down this provision. Speaking for a unanimous Court, Justice Dickson (as he then was) said, at p.777:

> I do not think there is any doubt s.49 of the Wildlife Act is beyond the constitutional competence of the Province of Manitoba and ultra vires in entirety. The provision cannot purport to be a law of general application. Section 49 has effect only against Indians and its sole purpose is to limit or obliterate a right Indians would otherwise enjoy. While provincial law may apply to Indians, it can only do so "... as long as such laws do not single out Indians nor purport to regulate them qua Indians...": see Four B Manufacturing Ltd.

The 'singling out' doctrine poses very serious problems for provincial laws relating to Indian education. If a provincial Education Act does not mention Indians and simply treats them on the same basis as other students in the province such an approach would be constitutionally sound under the general proposition that provincial laws of general application can apply to federal subject matters. But if the law had specific provisions relating just to Indians then it would run afoul of the singling out doctrine, just as section 49 of the Manitoba Wildlife Act did in Sutherland.

It might be objected that the provision in issue in Sutherland hurt Indians -- i.e. it singled them out for negative treatment - and that, surely, the answer would be different if a provincial education law singled them out for special beneficial treatment. Although such treatment might mean that in practice neither Indians nor the federal government would challenge the law, in terms of constitutional doctrine the distinction would probably make no difference. The 'singling out' doctrine identifies a federalism, not a civil liberties (i.e. discrimination) problem -- namely, that a provincial law deals too directly (perhaps positively, perhaps negatively) with a federal subject matter. Nothing, in constitutional terms, turns on the manner in which the provincial law deals with the federal subject matter; rather what matters is the fact of provincial intrusion into

the domain of that subject matter. Accordingly, a provincial law that dealt only with Indian education, even if the motivation behind it was a good one and the actual provisions were beneficial to Indians, would probably be unconstitutional.

The second potential limitation on provincial laws applying to Indian education is the constitutional doctrine that a provincial law of general application (i.e. a law that does not single out) cannot apply to a federal subject matter if such application would affect an integral part of federal jurisdiction. Citing the leading case of Four B Manufacturing Ltd., Professor Slattery, in his article Understanding Aboriginal Rights, put the point this way, at p.776:

> Nevertheless, there is a point at which provincial laws of general application intrude into federal jurisdiction. That point is reached where the laws affect matters that are integral to the federal heads of power.

What then are integral or vital parts of federal jurisdiction over Indians? In a series of cases, especially Natural Parents v. Superintendent of Child Welfare (1975), 60 D.L.R. (3d) 148, Kruger and Manuel v. The Queen (1977), 75 D.L.R. (3rd) 434, and Dick v. The Queen (1985), 23 D.L.R. (4th) 33, the Supreme Court of Canada has said that provincial laws of general application cannot apply to Indians if they affect the notion of Indianness or the status of being an Indian or the essential Indian-based practices of Indians. Although education is, obviously, as important for Indians as it is for everyone I doubt that provincial laws dealing with Indian education would be held to affect these matters. Indian education, in a constitutional doctrine sense, is not likely to be held to be a vital or integral part of federal jurisdiction under section 91(24) of the Constitution Act, 1867.

A third limitation on provincial jurisdiction is the proposition that provincial laws of general application cannot affect the possession and use of Indian lands. In Moosehunter v. The Queen (1981), 123 D.L.R. (3d) 95, the Supreme Court of Canada held that although a provision in the Saskatchewan Game Act was valid provincial legislation it could not operate to restrict the right of Indians to hunt in a non-dangerous manner for food in areas to which Indians had a constitutional right of access and where limited hunting was allowed. And in Derrickson v. Derrickson (1986), D.L.R. (4th) 175, the Supreme Court held that the provisions relating to land ownership and possession in the British Columbia Family Relations Act were constitutionally inapplicable to lands in a reserve held by an Indian.

This third limitation on provincial jurisdiction probably has little relevance in the context of Indian laws. Provincial education laws do not use land as a touchstone or organizing principle and would not likely, therefore, run afoul of this limitation. However, the limitation would be relevant if a provincial government, acting pursuant to its education power, ever tried to regulate federal schools or band schools. Such an attempt would violate not only the conflict doctrine (the conflict would be with sections 114-123 of the Indian Act); it would also violate the limitation on provincial jurisdiction that establishes that general provincial laws cannot regulate Indian lands.

The final limitation on provincial laws is the one just mentioned -- conflict with a federal law. Although the doctrine of conflict has been defined very narrowly in Canadian constitutional law (see the discussion above of Multiple Access at pp.63-65) there has been an occasional case where a provincial law, valid in its own right, has been suspended because of a conflict with a federal law. The best example is Derrickson v. Derrickson where the Supreme Court of Canada found an actual conflict between some provisions of the British Columbia Family Relations Act and the federal Indian Act.

At the present time there is little risk of a conflict situation arising in the Indian education field. That is because there are hardly any explicit Indian education provisions in provincial laws and regulations. Moreover, even if there were such provisions at the provincial level, the education provisions in sections 114-123 of the Indian Act are so general that it is doubtful that it would be possible to identify an actual conflict between them and the provincial provisions. In other words, generality, vagueness and even silence with respect to most Indian education matters in both federal and provincial current laws does not raise much of a spectre of conflict. This could change noticeably if the governments decided to legislate more comprehensively in this domain. In particular, if the federal government decided to enact a comprehensive Indian Education Act then provincial laws affecting the education of Indians would have to be scrutinized much more critically to see if they conflicted with the comprehensive federal law. If an actual conflict were identified, then the doctrine of federal paramountcy would provide for the survival of the federal law and the suspension of the offending provincial law.

In conclusion, there is scope for provincial laws to deal with Indian education. Provincial laws of general application dealing with the education of all children in a province can apply to Indian children, by virtue of both the established principles of constitutional interpretation and section 88 of the Indian Act (provided that none of the exceptions in section 88 arises). However, provincial education laws that were Indian-specific

would be on much shakier ground. If a provincial law singled out Indians for separate treatment -- even beneficial separate treatment -- it would run the risk of being classified as a law whose subject matter was Indians, not education. If that happened the law would be unconstitutional because it would violate section 91(24) of the Constitution Act, 1867. In sum, then, it would be very difficult, in constitutional terms, for a provincial government to legislate separately and comprehensively in the field of Indian education. Any reforms in this field would need to take account of this constitutional limitation. In constitutional terms, in the field of Indian education the federal government has an open field; the provincial field is mined with potential constitutional bombs.

C. TREATY AND ABORIGINAL RIGHTS

I turn now to consider the potential impact of treaty and aboriginal rights on jurisdiction over Indian education.

Many Indian groups across the country are the subjects of treaties entered into by their ancestors and the Crown. All of these treaties create rights for the Indians and their successors who constitute one of the parties to the treaties. Treaty rights are in effect the result of formal promises made to the Indians in exchange for the relinquishment by the Indians of something which the government wanted.

Aboriginal rights are different from treaty rights in that they are not contained in a formal document. As well, the conceptual basis for aboriginal rights is also different from that of treaty rights. Whereas treaty rights flow from negotiations and promises, aboriginal rights are grounded in the fact that the aboriginal people were in possession of the land before the arrival of the European settlers. As described by Professor Slattery in his article Understanding Aboriginal Rights, at p.732:

> The doctrine of aboriginal rights is a basic principle of Canadian common law that defines the constitutional links between the Crown and aboriginal peoples and regulates the interplay between Canadian systems of law and government (based on English and French law) and native land rights, customary laws, and political institutions. It states the original terms upon which the Crown assumed sovereignty over native peoples and their territories.

The starting point for my analysis is the observation that treaty and aboriginal rights are every bit as much a part of Canadian constitutional law as federalism or civil liberties and human rights. If there were any doubt on this score it was removed by section 35 of the Constitution Act, 1982, which provides:

> 35(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.
>
> (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

Indeed, in some respects the constitutional guarantee of aboriginal and treaty rights in section 35 of the Constitution Act, 1982 is even stronger than the guarantees for other rights. For example, all of the other rights enumerated in that Act are subject to "reasonable limits" because of section 1. Moreover, the rights are protected from only government conduct, not private conduct, because of section 32. And some of the rights can even be explicitly overridden by governments because of section 33. None of these limitations applies to the aboriginal and treaty rights guaranteed by section 35 of the Constitution Act, 1982. Additionally, section 25 provides:

> 25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including
>
> (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
>
> (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

This provision establishes that the rights protected in the Canadian Charter of Rights and Freedoms, including equality rights, must not interfere with aboriginal or treaty rights held by Canada's aboriginal peoples.

The significance of section 35(1) of the Constitution Act, 1982 was commented upon by Chief Justice Dickson in Regina v. Sparrow (1990), 70 D.L.R. (4th) 385, probably the most far-reaching and important native rights case in our history. Chief Justice Dickson said, at p.406:

> It is clear, then, that s.35(1) of the Constitution Act, 1982 represents the culmination of a long and difficult struggle in both the political forum and the courts for the constitutional recognition of aboriginal rights. The strong representations of native associations and other groups concerned with the welfare of Canada's

aboriginal peoples made the adoption of s.35(1) possible.

Of course, section 35(1) of the Constitution Act, 1982 affirms only the 'existing' aboriginal and treaty rights of the aboriginal peoples of Canada. It is necessary, therefore, to determine what are these existing rights. That determination will almost certainly take several decades of political negotiations and court cases. However, the Supreme Court of Canada has already provided some strong guidelines to assist in this process of definition and determination. The centrepiece of these guidelines is the proposition that treaty and aboriginal rights will be liberally interpreted in favour of the holders of those rights.

The foundation for this proposition is in fact a case dealing with the interpretation of an ordinary federal statute, not the interpretation of a treaty or aboriginal right. In Nowegijick v. The Queen (1983), 144 D.L.R. (3d) 193, the issue was whether section 87(b) of the Indian Act, which exempts from taxation "the personal property of an Indian ... situated on a reserve" and provides that "no Indian ... is subject to taxation in respect of ... any" such taxation, applied so as to exempt from taxation under the Income Tax Act the income earned by an Indian as an employee of a company having its head office and administrative office on the reserve, even though his work for the company was done off the reserve. The reserve was the place where the Indian received his salary because it was the residence of the company. The Supreme Court of Canada decided in favour of the Indian employee and said this, at p.198:

> Indians are citizens and, in affairs of life not governed by treaties or the Indian Act, they are subject to all of the responsibilities, including payment of taxes, of other Canadian citizens.
>
> It is legal lore that, to be valid, exemptions to tax laws should be clearly expressed. It seems to me, however, that treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indian.
>
> (my emphasis)

The rule that ordinary statutes applying to Indians should be interpreted liberally in favour of the Indians has been parallelled, in particularly dramatic fashion in the last decade, by a similar development with respect to treaties. In two landmark decisions, Simon v. The Queen (1985), 24 D.L.R. (4th) 390, and Regina v. Sioui (1990), 70 D.L.R. (4th) 427, the Supreme Court of Canada has interpreted treaties in a manner very favourable to the Indian beneficiaries of the treaties.

In Simon the accused was a member of the Shubenacadie Indian Brook Band (No. 2) of the Micmac people. He was charged with offences contrary to section 150(1) of the Nova Scotia Lands and Forests Act of unlawful possession of a shotgun cartridge and unlawful possession of a rifle during closed season. At the time of the offences, the accused was travelling on a public highway adjacent to the Shubenacadic Indian Reserve. This highway passes through or by a forest frequented by moose or deer. The accused relied on the provisions of the treaty of 1752 between Major Jean Baptiste Cope, Chief of the tribe of Micmac Indians inhabiting the eastern coast of the province and the Governor of Nova Scotia. Article 4 of that Treaty provided that "the said tribe of Indians shall not be hindered from, but have free liberty of hunting and fishing as usual".

The accused lost in both Nova Scotia courts but won in the Supreme Court of Canada on the basis that the Treaty of 1752 protected his right to hunt. What is especially remarkable about the Supreme Court's judgment, written by Chief Justice Dickson, is the range of issues the Court considered and the fact that on every issue the Court construed the treaty liberally in favour of the Micmacs. First, the Court determined that the treaty was intended to create mutually binding obligations which would be solemnly respected. Second, the Micmac chief and the other signatories as delegates of the Micmac people were determined to have possessed full capacity to enter into a binding treaty on behalf of the Micmac. Third, the treaty constituted a positive source of protection against infringements of hunting rights. The fact that the right to hunt already existed at the time the treaty was entered into by virtue of the Micmac's general aboriginal right to hunt did not negate or minimize the significance of the protection of hunting rights expressly included in the treaty. Fourth, the inclusion of the phrase "as usual" did not limit the right to hunt to methods that were usual in 1752 nor to hunting for non-commercial purposes. Fifth, the right to hunt embodied in the treaty included those activities reasonably incidental to the act of hunting itself, including travelling with the appropriate hunting equipment to the hunting grounds. Sixth, the termination of a treaty will not be lightly assumed; once it is established that a valid treaty has been entered into, the party arguing for its termination bears the burden of proving the circumstances and events justifying termination. Seventh, the clear purpose and effect of section 88 of the Indian Act (discussed above, at pp.25-26) is to exempt Indians from provincial laws which restrict or contravene the terms of any treaty.

All of the above explicit points flow from what Chief Justice Dickson described as "the generally accepted

view that Indian treaties should be given a fair, large and liberal construction in favour of the Indians" (p.402). The decision is a striking and powerful signal that the Supreme Court of Canada will not interpret treaties in a narrow and formalistic fashion.

The decision of the Supreme Court five years later in Sioui is an explicit affirmation and even extension of the approach and principles of Simon. In Sioui the accused were charged with cutting down trees, camping and making fires in places not designated in Jacques-Cartier Park, contrary to regulations adopted pursuant to the Quebec Parks Act. The accused were members of the Huron Band of the Lorette Indian Reserve. They admitted that they committed the acts charged in the park, which is located outside the boundaries of the Lorette Reserve, but they claimed that they were practising certain ancestral customs and religious rights which were the subject of a treaty between the Hurons and the British. The document relied upon by the accused as being a treaty was signed September 5, 1760 by Brigadier General James Murray and set out that the Chief of the Huron Tribe had come to make peace with the British Crown and that henceforth "no English officer or party is to molest, or interrupt them in returning to their Settlement at Lorette; and they are received upon the same terms with the Canadians, being allowed the free Exercise of their Religion, their Customs, and Liberty of trading with the English". In 1760 the Indians were settled at Lorette on land given to them by the Jesuits at an earlier time but they made regular use of the territory which became Jacques-Cartier Park.

On the basis of this historical record, the Supreme Court upheld the accuseds' argument. The case is particularly interesting because, unlike Simon, the document in question was not formally titled a treaty. Nevertheless, the Court extended the principle of Simon to include not only the proposition that a treaty should be liberally construed but also the proposition that a liberal interpretation is also appropriate for the prior question of whether a document is a treaty. Chief Justice Lamer said, at pp.434-435:

> [T]he courts should show flexibility in determining the legal nature of a document recording a transaction with the Indians. In particular, they must take into account the historical context and perception each party might have as to the nature of the undertaking contained in the document under consideration...
>
> As the Chief Justice said in Simon ... treaties and statutes relating to Indians should be liberally construed and uncertainties resolved in favour of the Indians ... In our quest for the legal nature of the document of September 5, 1760, therefore, we should adopt a broad and generous interpretation of what constitutes a treaty.
>
> In my opinion, this liberal and generous attitude, heedful of historical fact, should also guide us in examining the preliminary question of the capacity to sign a treaty, as illustrated by Simon and White and Bob.

Finally, turning to the subject of aboriginal rights, the Supreme Court of Canada regards them as every bit as worthy of strong protection and liberal interpretation as treaty rights. This is abundantly clear from the Court's recent decision in Regina v. Sparrow (1990), 70 D.L.R. (4th) 385, probably the most significant decision ever in the area of native rights.

The accused was charged under section 61(1) of the federal Fisheries Act with the offence of fishing with a drift-net longer than permitted by the terms of an Indian food fishing licence which had been issued to the band of which he was a member. The accused was a member of the Musqueam Band and attempted to lead evidence to establish that the regulation was invalid because the band had an aboriginal right to fish for food, particularly salmon, in the area which could not be limited in the terms set out in the licence.

The evidence adduced indicated that the Musqueam have a history as an organized society going back long before the coming of the white man to British Columbia and that the taking of salmon from the area in question was an integral part of their life and had continued to be so to the present. On these facts, Chief Justice Dickson stated the issue in these terms, at p.389:

> This appeal requires this court to explore for the first time the scope of s.35(1) of the Constitution Act, 1982, and to indicate its strength as a promise to the aboriginal peoples of Canada...
>
> The issue is whether Parliament's power to regulate fishing is now limited by s.35(1) of the Constitution Act, 1982, and, more specifically, whether the net length restriction is inconsistent with that provision.

The Court decided in favour of the accused on the basis of section 35(1) of the Constitution Act, 1982. Throughout the judgment there are many powerful and eloquent passages which indicate very clearly that the Court regards section 35 as a significant and new source of protection for aboriginal rights. For example, on the important issue of what is meant by the word 'existing' in section 35, Chief Justice Dickson said, at p.397:

> Far from being defined according to the regulatory scheme in place in 1982, the phrase "existing aboriginal rights" must be interpreted flexibly so as to permit their evolution over time. To use Professor Slattery's expression, in "Understanding Aboriginal Rights"... the word "existing" suggests that those rights are "affirmed in a contemporary form rather than in their primeval simplicity and vigour". Clearly, then, an approach to the constitutional guarantee embodied in s.35(1) which would incorporate "frozen rights" must be rejected.

As well, and consistent with the Court's approach to treaty rights in Simon, the Court said that it would not easily assume that an aboriginal right had been extinguished. In Chief Justice Dickson's words, at p.401:

> In the context of aboriginal rights, it could be argued that, before 1982, an aboriginal right was automatically extinguished to the extent that it was inconsistent with a statute... That in Judson J.'s view was what had occurred in Calder ... where, as he saw it, a series of statutes evinced a unity of intention to exercise a sovereignty inconsistent with any conflicting interest, including aboriginal title. But Hall J. in that case stated ... that "the onus of proving that the Sovereign intended to extinguish the Indian title lies on the respondent and that intention must be 'clear and plain'" (emphasis added). The test of extinguishment to be adopted, in our opinion, is that the Sovereign's intention must be clear and plain if it is to extinguish an aboriginal right.

Finally, the Court reached back to an earlier case -- one not dealing with aboriginal rights -- to identify and employ a principle which, in the Court's eye, is an important one for understanding section 35(1) of the Constitution Act, 1982. In Guerin v. The Queen (1984), 13 D.L.R. (4th) 321, the Supreme Court spoke in terms of the equitable obligation or fiduciary duty on the Crown to deal with land for the benefit of Indians. In Guerin, officials of the Indian Affairs branch proposed that part of an Indian reserve in Vancouver be leased for the benefit of the Indian band. After an appraisal was conducted with the approval of the band, the officials commenced negotiations for the lease of the land to a golf club. The proposal of the golf club was not put before the band, but its terms were outlined. The appraisal was never submitted to the band, nor was the appraiser made aware of the proposed terms of the lease. The band resolved to surrender the land for the purpose of the intended lease. During a subsequent meeting between Indian Affairs officials and representatives of the Indian band and the golf club, an annual rent was agreed upon. Prior to the actual surrender, the band understood that the rent agreed upon applied to an initial term of fifteen years only and that the lease was renewable for six ten-year terms thereafter, the rent to be negotiable for each renewal term. On that understanding the band voted to surrender the land to the Crown "in trust to lease the same to such person or persons, and upon such terms as the Government of Canada may deem most conducive to our Welfare and that of our people". The surrender was accepted by Order in Council. In fact, the lease subsequently negotiated provided for four fifteen-year renewal terms at a rental to be determined by agreement or arbitration and subject to a fifteen per cent maximum increase during the first renewal term. The club had the right to terminate the lease at the end of any fifteen-year term upon giving six months' notice and it also had the right to remove all improvements. On most of these terms the band members were either not consulted or were informed that they had no choice in the matter. They were not given a copy of the lease until 1970. The trial judge awarded the band $10 million; ultimately, this award was confirmed by the Supreme Court of Canada.

The majority of the Court grounded its reasons in the concept of fiduciary duty. The Court said that the Indians had an aboriginal title in the lands and that this was a pre-existing legal right which was not created by the Royal Proclamation of 1763 nor by the land provisions of the Indian Act. Although the aboriginal title was impaired by European colonization and the colonists' claims to sovereignty, the Indians' rights of occupancy and possession remained unaffected. Hence their claim was an enforceable equitable obligation. This equitable obligation, or fiduciary duty, fell on the Crown and required that the Crown act for the benefit of the Indians. The Crown had not done this with respect to these lands and therefore was liable for damages.

Commenting (in many respects, quite presciently in light of the later Sparrow decision) on Guerin, Professor Slattery has written in his article Understanding Aboriginal Rights, at pp.731, 753 and 755:

> Another important effect of [Guerin] is to suggest that the Crown has a general trust-like obligation toward native peoples. This ruling has implications in a number of areas. It provides a standard for the interpretation of treaty promises made by the Crown to Indian peoples, and also for interpreting legislation that affects native rights ....
>
> Most important, however, is the fact that in Guerin the Supreme Court shows a willingness to consider the topic of aboriginal rights afresh, and to initiate a dialogue concerning the broad

principles that alone can make sense of the subject.

> The Crown has a general fiduciary duty toward native people to protect them in the enjoyment of their aboriginal rights ... this general fiduciary duty has its origins in the Crown's historical commitment to protect native peoples from the inroads of British settlers, in return for a native undertaking to renounce the use of force to defend themselves and to accept instead the protection of the Crown as its subjects.
>
> The Crown's general fiduciary duty binds both the federal Crown and the various provincial Crowns within the limits of their respective jurisdictions. The federal Crown has primary responsibility toward native peoples under section 91(24) of the Constitution Act, 1867, and thus bears the main burden of the fiduciary trust. But insofar as provincial Crowns have the power to affect native peoples, they also share in the trust.

Much of what Professor Slattery says about the implications of Guerin was confirmed in Sparrow. Moreover, and very importantly, in Sparrow the Supreme Court decided to make the notion of fiduciary duty a cornerstone of its interpretation of section 35 of the Constitution Act, 1982. Chief Justice Dickson said, at pp.408-413:

> In our opinion, Guerin ... ground[s] a general guiding principle for s.35(1). That is, the government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.
>
> [T]he guiding interpretive principle derived from ... Guerin ... is [that] the honour of the Crown is at stake in dealings with aboriginal peoples. The special trust relationship and the responsibility of the government vis-à-vis aboriginals must be the first consideration in determining whether the legislation or action in question can be justified.

In summary, then, in the last decade the Supreme Court of Canada has articulated several doctrinal principles which, individually and collectively, give a whole new level of protection to native rights. Both treaty and aboriginal rights will be interpreted liberally in favour of natives (Simon, Sioui, Sparrow) and the Crown has a strong fiduciary duty to protect those rights (Guerin), especially since they are now protected in the Constitution (Sparrow).

Applying these principles to the field of Indian education, all of the existing treaties contain education provisions. Typical is Treaty #2 which provides:

> And further, Her Majesty agrees to maintain a school in each reserve hereby made, whenever the Indians of the reserve shall desire it.

I believe that the education provisions in most of the major treaties impose a legal obligation to do more than simply 'maintain a school'. If Simon and Sioui teach us anything it is that the ancient and usually terse language of treaties will be interpreted in light of modern needs. Accordingly, depending on the historical evidence in particular cases, phrases like 'maintain a school' might be interpreted to mean 'provide effective education' because at the time a treaty was signed the provision of effective education was articulated in the shorthand 'maintain a school' mode. In any case, whatever the actual content of individual treaties (this will depend not only on statutory interpretation but also on the historical record) the important point is that there can be no doubt that when there is an education provision in a treaty it will be interpreted liberally so as to ensure that it operates in a meaningful way in the current context.

Turning to aboriginal rights and education, the relationship, it seems to me, is more difficult to define. Aboriginal rights have historically been considered to relate to land and matters closely connected to land. Accordingly, aboriginal rights are usually thought to encompass such matters as land claims, and hunting, fishing and trapping rights,. It is difficult to see how education rights come within this conception of aboriginal rights.

However, some Canadian scholars have argued that a broader conception of aboriginal rights is required and that education could be included within this broader conception. Professor William Pentney, in a major and important article entitled The Rights of the Aboriginal Peoples of Canada and the Constitution Act, 1982, (1988), 22 U.B.C. L.R. 21, has put the argument in these terms, at pp.259-260:

> The traditional legal definition of aboriginal rights already recognizes and protects land use and customary family law rules and practices. Logically this recognition should extend to other manifestations of group life, such as membership, heredity and leadership rules, and customary punishments for violation of the group's rules. If s.35(1) requires courts to give effect to these sorts of practices, it will be partially successful in achieving the protection of the group's "different-ness", which must be the basic function of any constitutional recognition of collective rights.

> Interpreted in this fashion, s.35 will ensure that the conditions which are essential for the continuance of the group, namely land base and control over membership decisions, will be preserved. This view of aboriginal rights preserves the group itself and ensures that the group can continue to follow its traditions...
>
> A related aspect of this conception of aboriginal rights is group control over internal matters such as education, marriage, divorce and adoption. Respect for aboriginal rights in law must mean more than recognition of land use and harvesting activities. Other group activities and practices which were part of the pre-existing social structure should be included within the concept of aboriginal rights because these activities reflect and embody the group's "differentness." Protection of the group's existence will be meaningless unless it is accompanied by protection of the group's activities and institutional structures and capacity for maintaining these by practice and education. All aboriginal societies had institutional structures governing sustenance, culture, family and leadership, although the complexity of these rules differed between societies. These structures are part of the concept of aboriginal rights.
>
> (emphasis added)

It is impossible to say with certainty that Canadian courts would decide that education is a constitutionally protected aboriginal right. Moreover, even if the Supreme Court of Canada was prepared to take that step, it would be very difficult to speculate on the actual content of the right. Much would depend, as it always does in considering aboriginal rights, on local history. Nevertheless, in light of the far-reaching language and bold spirit of the Supreme Court's decision in Sparrow, a future argument that in some communities there is an aboriginal right to education cannot be dismissed.

D. CANADIAN CHARTER OF RIGHTS AND FREEDOMS

Until 1982 the core of Canadian constitutional law was federalism -- the distribution of powers between federal and provincial governments. However, the Constitution Act, 1982, which patriated the Canadian Constitution and provided a new formula for constitutional amendments, also contained as a centrepiece the Canadian Charter of Rights and Freedoms, a comprehensive, progressive, powerful and constitutionally protected statement of individual and collective rights.

For Canadian natives, and probably for most Canadians, the most important right protected in the Charter is equality. It is protected in a two-fold statement in section 15 of the Charter:

> 15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> (emphasis added)

Section 15 of the Charter has recently been interpreted by the Supreme Court of Canada in two major cases, Andrews v. Law Society of British Columbia (1989), 56 D.L.R. (4th) 1, and Turpin and Siddiqui v. The Queen (1989), 48 C.C.C. (3d) 8. These two decisions establish two important general propositions -- first, that the principle of equality is a long-standing and very important part of our constitutional tradition; secondly, that the expression of the equality right in section 15 is very broad and spells out four basic rights (equality before the law, equality under the law, equal protection of the law and equal benefit of the law).

A more specific proposition that emerges from these cases is the lack of relevance of the earlier equality jurisprudence under the Canadian Bill of Rights. Referring to the four-fold expression of the equality right in section 15, the Supreme Court said in Andrews, at p.14:

> The inclusion of these last three additional rights in s.15 of the Charter was an attempt to remedy some of the shortcomings of the right to equality in the Canadian Bill of Rights. It also reflected the expanded concept of discrimination being developed under the various Human Rights Codes since the enactment of the Canadian Bill of Rights.

This explicit signal that the Supreme Court believes that section 15 of the Charter was intended to go beyond the protection of equality in the Canadian Bill of Rights is particularly important for natives because some of the leading, indeed notorious, equality decisions under that document were rendered in cases affecting native rights. That the current Court recognizes that some of those decisions were wrong and has no intention of following them is clear from Andrews, at pp.14-15:

> The shortcomings of the Canadian Bill of Rights as far as the right to equality is concerned are well known. In A.G. Can. v. Lavell ... (1973), 38 D.L.R. 481 ... for example, this court upheld s.12(1)(b) of the Indian Act which deprived women, but not men, of their membership in Indian bands if they married non-Indians. The provision was held not to violate equality before the law although it might, the court said, violate equality under the law if such were protected ... It is readily apparent that the language of s.15 was deliberately chosen in order to remedy some of the perceived defects under the Canadian Bill of Rights.
>
> (emphasis added)

A fourth important proposition from Andrews is the Court's articulation of what constitutes discrimination under section 15. Speaking for the Court, Justice McIntyre defined it in these terms, at p.18:

> I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individuals or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.

In Turpin, the Court expanded on this definition by suggesting that some of the indicia of discrimination are "stereotyping, historical disadvantage or vulnerability to political and social prejudice" (p.35).

The modern formulation of equality in section 15 of the Charter and its subsequent interpretation by the Supreme Court of Canada in Andrews and Turpin make it clear, I believe, that any law in the field of Indian education must not hurt or disadvantage or negatively affect, even slightly, Indians. Any such law would violate section 15 of the Charter. This conclusion applies, because of section 32, of the Charter, to all federal, provincial and territorial laws. It also applies not only to federal Indian laws and provincial education laws, but to all federal and provincial laws irrespective of their subject matter. In other words, laws whose principal subject matter is not Indians or education cannot negatively affect Indian education. Andrews states explicitly that discrimination can occur "whether intentional or not" (p.18). Accordingly, ordinary laws which unintentionally discriminated against Indians in an education context would violate section 15. Finally, it is not just federal, provincial and territorial laws which are subject to Charter scrutiny. All of the subordinate regulations and all the bureaucratic implementation of laws and regulations are also subject to review. That is because section 15 defines the equality right not only in terms of equality before the law but also in terms of equality under the law. The use of the word 'under' was intended, and has been interpreted, to capture for judicial scrutiny the entire law-making process -- i.e. law creation and law administration.

Of course, one would hope that federal or provincial laws would not discriminate against Indians in the field of education. The more likely scenario, one would hope, would be that federal and provincial governments, recognizing the important role of education as part of the solution to the current social and economic problems of many natives, would try to legislate affirmatively to confer benefits on natives in the field of education. Indeed, that is happening already; an example would be the federal government's support for Indians in post-secondary education. The question that this program (and similar ones) raise is: because they confer a benefit on Indians do they violate section 15 of the Charter?

In my view, the answer to this question is certainly 'No'. Section 15(2) of the Charter explicitly authorizes affirmative action programs on, inter alia, a racial basis. Although the Supreme Court of Canada has not yet interpreted this provision, its clear purpose and wording would, I am certain, be respected by the Court. Accordingly, any federal or provincial Indian education law, or any Indian education provisions in broader federal or provincial laws, which conferred benefits on Indians in an education context would be upheld under section 15(2) of the Charter.

I need to make one qualification to this conclusion. Although there may not be a civil liberties, specifically a Charter, objection to federal and provincial laws conferring benefits on Indians in an education context, there may be a federalism problem with provincial laws which confer such benefits only on Indians. I refer back to the 'singling out' problem (pp.75-77). If a provincial education law or provision dealt only with Indians it would run the risk, however beneficial it might be, of being labelled a law in relation to Indians, not education; it might, therefore, be struck down as a violation of s.91(24) of the Constitution Act, 1867. The way to avoid this problem would be for the provincial government to confer the additional education benefits on a broader range of disadvantaged students, including Indian students. In a federalism context the law would probably be valid under section 93 of the Constitution

Act, 1867; in a civil liberties context, the additional benefits would be justified under the affirmative action wording of section 15(2) of the Constitution Act, 1982.

E. INTERNATIONAL LAW

Canada has always aspired to be a full and faithful member of the international community. Canada was one of the original signatories of the United Nations Charter in 1945; the United Nations Declaration of Human Rights, the cornerstone of the international regime for the protection of human rights, was drafted by a Canadian, Dr. John Humphrey; Canada has always played an active and selfless role in international peacekeeping missions; and Canada has been elected to the Security Council far more often that its population and power would appear to warrant.

In the international arena, the protection of human rights is a very important objective. The Declaration of Human Rights is a comprehensive umbrella document protecting a wide range of human rights. The International Covenant on Civil and Political Rights builds on the Declaration and protects other rights. So does the International Covenant on Economic, Social and Cultural Rights.

None of these international documents is binding on Canadian governments nor are they enforceable in Canadian courts. That does not mean, however, that the rights protected in the documents are irrelevant in the Canadian political arena or in Canadian jurisprudence. In the political arena, Canada is a signatory to all these documents and should, therefore, feel bound as a matter of political morality to comply with them. In the judicial arena, although the international documents and their interpretation by international bodies do not bind our legal system, the Supreme Court of Canada has made it clear recently that it regards international norms as an important source for interpreting Canadian law, especially the human rights protected in the Charter. In Reference Re Public Service Employee Relations Act, Labour Relations Act and Police Officers Collective Bargaining Act (1987), 38 D.L.R. (4th) 161, Chief Justice Dickson said, at pp.184-185:

> Canada is a party to a number of international human rights conventions which contain provisions similar or identical to those in the Charter. Canada has thus obliged itself internationally to ensure within its borders the protection of certain fundamental rights and freedoms which are also contained in the Charter. The general principles of constitutional interpretation require that these international obligations be a relevant and persuasive factor in Charter interpretation. As this court stated in R. v. Big M Drug Mart Ltd. ... interpretation of the Charter must be "aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection". The content of Canada's international human rights obligations is, in my view, an important indicia of the meaning of "the full benefit of the Charter's protection". I believe that the Charter should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified.
>
> In short, though I do not believe the judiciary is bound by the norms of international law in interpreting the Charter, these norms provide a relevant and persuasive source for interpretation of the provisions of the Charter, especially when they arise out of Canada's international obligations under human rights conventions.

The effect of international norms on Canadian governments and law can be seen most graphically in the case of a Canadian native woman, Sandra Lovelace. The old section 12(1)(b) of the Indian Act provided that an Indian woman who married a non-Indian lost her Indian status. However, an Indian man who married a non-Indian woman did not lose his status; indeed, the non-Indian woman acquired Indian status because of the marriage. In the 1970s several Indian women challenged this provision under the equality provision of the Canadian Bill of Rights. Ultimately they lost in a famous and much-criticized decision by the Supreme Court of Canada, Attorney General of Canada v. Lavell (1974), 38 D.L.R. (3d) 481.

Sandra Lovelace, a Maliseet Indian living in New Brunswick, tried a different tack -- the international arena. She alleged that section 12(1)(b) of the Indian Act violated several provisions of the International Covenant on Civil and Political Rights -- Article 23(1), the protection of the family; Article 23(4), the equality of spouses in marriage; Article 26, protection against discrimination; and Article 27, the right of individuals belonging to minorities to enjoy their culture, practise their religion, and use their language in community with others of their group. The Human Rights Committee established pursuant to the International Covenant found in Mrs. Lovelace's favour on the basis of Article 27. Although this decision was not enforceable in the Canadian courts and was not binding on the federal Government, it proved to be a major embarrassment for the Government and led, I believe, to the repeal of section 12(1)(b) of the Indian Act in 1985.

The Alberta Labour decision of the Supreme Court of Canada and the Lovelace decision of the Human Rights Committee illustrate the two ways in which international human rights standards affect Canadian politics and law. The Alberta Labour case is particularly important for Canadian courts -- it says that the actual wording of international documents which Canada has signed and the interpretation placed on those documents by the proper international institutional interpreters are important sources for the interpretation of similar words in Canadian documents. The Lovelace case, and its aftermath in Canada, are important for governments -- they establish that once Canadian governments sign an international document they will be compelled (not by law, but by considerations of morality and/or embarrassment) to comply with the terms of that document as interpreted by the international community through its institutions.

Against this background, I turn to the subject of Indian education in the international arena. There are references to education in several international human rights documents, including the International Covenant on Economic, Social and Cultural Rights. These references are usually extremely general -- i.e. they enunciate the importance of education and a commitment to make it available to everyone. A couple of documents, however, are more specific and, therefore, more relevant to Indian education. In one document, the U.N.E.S.C.O. Convention Against Discrimination in Education (1960) there is recognition of the right of 'national minorities' to carry on their own educational activities.

The second important international document with a potential impact on Indian education in Canada is the Indigenous and Tribal Peoples Convention, 1989 (Convention 169) enacted by the General Conference of the International Labour Organization (I.L.O.). It is my understanding that Canada is not yet a signatory of this Convention. However, since Canada is a member of the ILO and since, I understand, Canada played a major role in the drafting of the Convention, I am assuming (and certainly hope) that Canada will become a signatory. The rest of my discussion of Convention 169 is premised on that assumption.

The preamble sets out some of the reasons for this new Convention:

> Considering that the developments which have taken place in international law since 1957, as well as developments in the situation of indigenous and tribal peoples in all regions of the world, have made it appropriate to adopt new international standards on the subject with a view to removing the assimilationist orientation of the earlier standards, and
>
> Recognizing the aspirations of these peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live.

The substantive provisions dealing with education are contained in Part VI of the Convention, Articles 26-31. The two key provisions are Articles 26 and 27 which provide:

> **Article 26**
>
> Measures shall be taken to ensure that members of the peoples concerned have the opportunity to acquire education at all levels on at least an equal footing with the rest of the national community.
>
> **Article 27**
>
> 1. Education programmes and services for the peoples concerned shall be developed and implemented in co-operation with them to address their special needs, and shall incorporate their histories, their knowledge and technologies, their value systems and their further social, economic and cultural aspirations.
>
> 2. The competent authority shall ensure the training of members of these peoples and their involvement in the formulation and implementation of education programmes, with a view to the progressive transfer of responsibility for the conduct of these programmes to these peoples as appropriate.
>
> 3. In addition, governments shall recognise the right of these peoples to establish their own educational institutions and facilities, provided that such institutions meet minimum standards established by the competent authority in consultation with these peoples. Appropriate resources shall be provided for this purpose.

I want to draw attention to one other Article from Convention 169. It is not specifically an education Article; rather it is a general Article dealing with the process for implementing Convention 169 in signatory countries:

> **Article 6**
>
> 1. In applying the provisions of this Convention, governments shall:
>
> (a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to

legislative or administrative measures which may affect them directly may affect them directly;

(b) establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them;

(c) establish means for the full development of these peoples' own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose.

2. The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.

Although the Indigenous and Tribal Peoples Convention could not be enforced in Canadian courts, Canada as a member of the International Labour Organization should accept its terms. Accordingly, as a matter of government morality the federal Government especially, but also provincial governments, should make a sincere and successful effort to comply with and implement the Convention. In that vein, it is worth noting, I believe, that the philosophy underlying, and some of the specific provisions of, Convention 169 are strikingly similar to the philosophy and some of the specific recommendations of the Assembly of First Nations' study Tradition and Education: Towards A Vision of our Future. The emphasis in Tradition and Education on the aspiration of Indian people to control their educational institutions, the goal of having education programs rooted in Indian history, knowledge and value systems, the ambition to train more Indian people to play roles as teachers and administrators in their own school systems, and the consistent message that all policy, including education policy, affecting Indians must be based on a process involving their consultation, participation and even consent are all echoed -- quite explicitly -- in Convention 169. In my view, Canada's membership in the I.L.O. and its probable acceptance of Convention 169 say something important about how the federal Government should respond to Tradition and Education. Convention 169 lends support, in a moral sense, to the process of education policy-making, the goals of education policy and some of the specific reforms discussed in Tradition and Education.

V. REFORM OPTIONS

The previous section of this paper, dealing with the constitutional framework for native education in Canada, was a long one. However, because I was able to make fairly clear-cut conclusions about the jurisdictional issues I considered, it means that this section of the paper can be quite brief. In this section of the paper I address the questions: what are the options for reform in the field of Indian education, which of the options are constitutionally permissible, and what structural formats might the options take? I will consider these questions under four headings or models:

Model #1 - Expanded Provincial/Territorial Jurisdiction and Responsibility

Model #2 - Expanded Federal Jurisdiction and Responsibility

Model #3 - Expanded Indian Jurisdiction and Responsibility

Model #4 - Co-operative Options

Before turning to a discussion of these options, I want to make one preliminary comment. If one looks at the Indian Act one sees only the bare skeleton of substantive subject matters relating to Indian education. Yet one knows that Indian education in the 1990s consists of many, many subject matters -- establishment and management of tuition agreements, creation and jurisdiction of school boards, representation of parents, including Indian parents, on school boards, teacher training and licensing, the labour relations of all academic and non-academic staff in schools, the curriculum, school construction and maintenance, education finance, levels of education (pre-school, elementary, secondary, post-secondary), types of education (academic and vocational), student access to schools including questions of transferability, special programs in schools including language and cultural programs, and many more subject matters. Any of these might be the focus of reforms. The merits of the reforms, and the assignment of individual subject matters to federal, provincial or Indian authorities, are questions of education policy. Their resolution would depend on history, experience, economics, governmental preferences, governmental agreements and, ultimately, considerations of merit and progress. I do not feel qualified to pass judgment on these questions of education policy. My preliminary point, however, is this: in constitutional terms, these subject matters are identical. On the provincial side, all of the subject matters relate to education; on the federal side, all potentially relate to Indians. Accordingly, there are no constitutional distinctions to be made between and among the subject matters listed above.

A. MODEL #1 – EXPANDED PROVINCIAL/ TERRITORIAL JURISDICTION AND RESPONSIBILITY

This is the model with the most jurisdictional pitfalls. As discussed above (see pp.25-26) any provincial attempt to deal in isolation with Indian education would potentially run afoul of the 'singling out' doctrine and, therefore, be a violation of section 91(24) of the Constitution Act, 1867. This could well be the result even if the provincial laws and programs benefitted Indians and were, therefore, consistent with the equality/affirmative action values protected by section 15 of the Constitution Act, 1867.

Sometimes careful drafting can overcome constitutional pitfalls. If that happened (e.g. by merging Indians and other groups in the legislation to avoid the singling out problem; note, however, that the merger would have to be genuine, not artificial, in order to avoid the colourability problem discussed above at pp.20-21) then there are three possible sub-models for expanding provincial or territorial jurisdiction and responsibility over Indian education -- first, the establishment of a specific organizational structure, including personnel, for Indian education at the Ministry level of provincial or territorial governments; secondly, the establishment of a specific organizational structure at the regional level within a province or territory (e.g. the Cree model in Quebec); and thirdly, the establishment of specific organizational structures at the local level throughout a province or territory.

B. MODEL #2 -- EXPANDED FEDERAL JURISDICTION AND RESPONSIBILITY

I see no constitutional constraints on an expanded federal role in Indian education. Section 91(24) of the Constitution Act, 1867, section 15(2) of the Constitution Act, 1867, judicial formulation of the fiduciary doctrine and some of the provisions of some treaties would all support federal initiatives in the field of Indian education. Whether the federal government should move in this direction and, if it does, how it should proceed (including the appropriate manner and form of consultation with Indian representatives and education experts) are important questions worthy of serious consideration and discussion. However, there can be no doubt about the jurisdictional question -- the federal government has wide authority in this domain.

If the federal government decided to proceed in this direction there are a number of sub-models to consider -- first, expanded involvement of DIAND in Indian education; secondly, creation of a new Ministry for Indian education; thirdly, creation of a Crown corporation with a mandate over Indian education. As well, two other non-structural possibilities for expanding

federal jurisdiction and the federal role could be considered -- first, the assumption by the federal government of jurisdiction over, and responsibility for, the education of Indians off-reserve; secondly, an expanded and explicit involvement in provincial education policies and programs as they affect Indians.

C. MODEL #3 - EXPANDED INDIAN JURISDICTION AND RESPONSIBILITY

Tradition and Education states, correctly in my view, that the legal basis for expanded Indian jurisdiction over Indian education could take any of three forms -- first, constitutional amendment; second, federal legislation; third, judicial decision.

The constitutional amendment option is perhaps more likely today than at any previous point in Canadian history. The current round of constitutional negotiations, and in particular the new and enhanced role given to First Nations' representatives in those negotiations, might lead in the next year or so to some form of constitutional recognition for aboriginal self-government. If that happened, one of the possible negotiated subject matters sheltered under the self-government rubric might be aboriginal education.

The second possible form for enhanced Indian jurisdiction over their education -- namely, federal legislation -- is an obvious possibility in light of section 91 (24) of the Constitution Act, 1867, the education provisions of the Indian Act and the long history of federal legislative and administrative involvement in this field.

The third possibility, judicial decision(s), is/are, like constitutional amendment, perhaps more likely now than at previous times in Canadian history. In light of the Supreme Court of Canada's recent decisions affirming the existence of, and construing very liberally, aboriginal and treaty rights, it would be foolhardy to dismiss the possibility that the Court might decide that there is a juridical basis for the concept of inherent aboriginal sovereignty which might include, depending on particular historical factors in particular locales, an education component.

If Indian jurisdiction and responsibility were to be expanded, a number of sub-models for achieving this goal could be considered -- first, expanded jurisdiction at the national level, through either existing national organizations like the Assembly of First Nations or a new national Indian education authority; second, expanded jurisdiction at the regional level, through either existing tribal councils or separate education authorities (e.g. the Cree model in Quebec); third, expanded jurisdiction at the local level, through either existing band councils or separate local education authorities/boards.

D. MODEL #4 -- CO-OPERATIVE OPTIONS

None of the three options just discussed needs to be viewed in isolation. It is possible to combine two or even three of the models and various combinations of the sub-models. Combinations are especially possible with model #3, enhanced Indian jurisdiction and responsibility, because it would be possible for either or both levels of government to negotiate this model with Indian representatives. There would be, to my knowledge, no constitutional or other constraints on the co-operative possibilities provided that each level of government stayed within its own jurisdiction as it formulated and implemented its part of the co-operative enterprise.

VI. CONCLUSIONS AND RECOMMENDATIONS

My conclusions and recommendations are:

(1) QUALITY OF TRADITION AND EDUCATION

The Assembly of First Nations should be complimented for the quality of Tradition and Education: Towards A Vision of Our Future. Its distinctive research methodology -- a nationwide process of consultation with Indians in local communities -- has generated a rich vein of valuable information about the state of Indian education throughout Canada. Moreover, many of the organizing principles -- including the key one, self-government and Indian jurisdiction over education -- are both sensible and attainable and are, accordingly, worthy of serious consideration by the Government of Canada.

(2) ROLE OF DIAND RE TRADITION AND EDUCATION

DIAND should also be complimented, first for providing substantial financial resources to support the research, consultations and publication of Tradition and Education and, secondly, for signalling that it wants to give serious and timely attention to Tradition and Education.

(3) CONTINUATION OF PROCESS

The process set in motion by Tradition and Education should continue.

On the AFN side, this means that it should be encouraged and supported in its ambition to consult further with local Indian communities about Tradition and Education. The initial consultation process significantly influenced the contents of the final report. Now the AFN would like to have the opportunity to consult with those communities again to see if the report reflects their views and, importantly, to move towards implementation of the report. In my view, these are two worthy objectives. A consultative process - especially one firmly focussed on the identification and actual implementation of substantive education reforms in the near future -- should be encouraged and supported.

On the government side, the continuation of the process should mean a willingness to enter into serious discussions and negotiations with the AFN about the future process and substance of major reforms in the field of Indian education. This would be consistent with the current process of discussion and negotiation in the constitutional reform arena and with the structure and probable method of operation of the Royal Commission on Aboriginal Peoples, in both of which the notions of sharing, co-operation and equality are absolutely central. Moreover, this would also be consistent with one of the important themes articulated by the Prime Minister in his speech on April 23, 1991 to the First Nations Congress in Victoria, British Columbia:

> We are on the threshold of producing very beneficial and lasting change. By 'we', I mean the aboriginal peoples and the government, together, as partners.

(4) INDIAN DIRECTION OF PROCESS

Any joint process of Government-Indian consultation and negotiation in the field of Indian education must be directed by the needs and views of the Canadian Indians. Looking backwards, the theory of both Indian control and devolution (two long-standing federal policies) requires this starting point. Looking forward, the theory and practice of self-government are firmly premised on the same starting point. What this means is that any movement to implement some of the ideas in Tradition and Education must flow from a process with which the legitimate representatives of the Indian people are satisfied.

Accordingly, I would recommend that DIAND and the AFN begin serious discussions about the process for making substantial reforms in the field of Indian education. I believe that these discussions would be timely and, potentially, quite productive. As I worked on this report over the last year, I was very impressed with the senior leadership of both the Education Secretariat of the AFN and the Education Branch of DIAND. I believe that they exhibit a shared deep commitment to improving the education of Indian children throughout Canada. If they could agree on a few starting points -- e.g., the high value of the research and many of the ideas in Tradition and Education and the need for a joint process, directed by the needs and views of Indian representatives, to work towards implementation of some of the good recommendations in Tradition and Education -- then I believe the experience, commitment and high calibre of the senior leadership in the education branches of both organizations would lead towards substantial improvements in the field of Indian education. The joint process that has been established in the constitutional reform process and in the very structure of the Royal Commission on Aboriginal Peoples is appropriate in the Indian education domain as well.

I have referred in the two preceding paragraphs to discussions and co-operation between the AFN and DIAND. By way of explanatory comment, I would not want to be understood as saying that discussions and co-operation between only these two institutions are appropriate. I realize that there are important initiatives with respect to Indian education taking place in a variety of other fora, including among professional Indian

educators themselves (e.g. MOKAKIT and the National Indian Education Forum) and at the provincial First Nations level (e.g. separate education branches or secretariats in several of the provincial First Nations organizations). These institutions and their education initiatives are valuable. Indeed, it may well be that both DIAND and the AFN, separately and/or together, might find discussions and co-operation with these institutions useful. However, specific suggestions along these lines are beyond the purview of my report which is focussed on Tradition and Education, an AFN document.

(5) SELF-GOVERNMENT

The central theme of Tradition and Education, Indian jurisdiction over Indian education, is a legitimate one and should form the centrepiece of negotiations about reforms in Indian education. It is a goal entirely consistent with the concept of native self-government which has been explicitly endorsed by the federal Government (see the Prime Minister's Victoria speech) and is the focus of negotiations on the constitutional front.

Native self-government should not be a scary concept for Canadian governments. If governments for decades have permitted, by legislation, professions like lawyers and doctors to be 'self-governing', and have allowed them real independence in the governance and operation of their affairs, and if conservative American administrations in the 1970s and 1980s have not choked on at least the theory of self-government for American Indians, then it should not be much of a leap of imagination for Canadian governments to accept, and genuinely implement, the concept of native self-government in Canada. We should not allow our pre-occupation with the place of Quebec in Canada or our political and legal thinking rooted in the concept and definition of federalism to lead us to the facile, but wrong, conclusion that self-government means independence or self-determination. Self-government does not mean these things. What it means is native jurisdiction and control over and responsibility for the matters which affect the lives of Canadian natives. One of the most important of those matters is education. It is my view that both the overarching goal of native self-government and its specific application in the field of Indian education are legitimate and timely and that the Government of Canada should negotiate with the AFN within a framework that respects and gives voice to these propositions.

(6) CONSTITUTIONAL AMENDMENT

The preferred mechanism for moving forward in the field of Indian education would be, as Tradition and Education suggests, under the umbrella of a constitutional amendment dealing with the fundamental nature of the relationship between Canadian natives and Canadian governments. I say this for three reasons.

First, a constitution is the most important public document in a nation. It should deal with fundamental questions like government structure and operation and the relationship between governments and individuals or groups. The current Canadian Constitution does not do this with respect to the relationship between Canadian governments and Canadian natives.

Secondly, it is my view that the goal of enshrining native self-government in the Constitution is a legitimate and worthy one. It seems strange, and it is surely unfortunate, that the Constitution spells out in great detail the constitutional status and jurisdiction of federal, provincial and territorial governments but is silent about the status and jurisdiction of native governments even though these existed long before the arrival of European settlers.

Thirdly, and importantly, there is an element of timeliness or ripeness in the goal of enshrining native self-government in the Constitution. The current process of constitutional reform on issues of importance to Canadian natives is, at least at the present time, a consensual process agreed to by the Government of Canada and the representatives of the native people (I am not aware of any opposition from provincial governments). Moreover, there is also agreement that the subject matter of native self-government is at the heart of the current constitutional reform agenda.

For these reasons, concentration on the constitutional reform arena and on the specific issue of native self-government seems appropriate. If successful, the results of the constitutional negotiations and amendments might provide an umbrella of general principles, including self-government, to guide the reforms that could then take place in specific areas such as Indian education.

(7) NATIONAL INDIAN EDUCATION LAW

I would further recommend, however, that neither DIAND nor the AFN, as they decide what to do in the Indian education field, put all their eggs in the constitutional reform basket. If the history of constitutional negotiations in the 1980s teaches us anything it is that those negotiations are complex, difficult and divisive and are fraught with the potential for failure and even tragedy. The complete failure of the 1984-1987 aboriginal constitutional reform process and the 1987-1990 Meech Lake process should make governments and natives alike wary of hitching their wagons to the solitary star of constitutional amendment. (It is perhaps worth noting that this statement is equally

applicable to the experience of other federal nations, including Australia and the United States.)

Accordingly, I would recommend that DIAND (especially the Education Branch) and the AFN (especially the Education Secretariat) seriously consider working together on developing a national education statute. I suggest this for several reasons.

One I have already mentioned -- there is no guarantee that the current constitutional reform process will succeed. The failure of that process, particularly at this fragile time in our history, would be disappointing, perhaps devastating. Moreover, it would make progress in other arenas, including the legislative arena, more difficult to achieve. However, it should not, in my view, completely preclude the possibility of progress in other arenas.

My second reason for suggesting that joint DIAND-AFN work on a national education law be seriously considered at this time is that such work might provide an interesting and useful point of intersection between a specific issue, namely education, and the broad concept of self-government which will be a principal focus in the constitutional reform arena. One of the standard criticisms by governments of the concept of self-government is that it is too vague, that its contents are too murky or uncertain. Serious, shared work by DIAND and the AFN on a specific issue like education in a self-government context might remove some of the mystery, confusion and governmental unease which surrounds the concept. If that happened in the education context, the process might provide a useful backdrop or experience against which progress in other arenas could proceed.

Thirdly, the education provisions of the Indian Act are skeletal and archaic. They, along with so many other provisions of the Act, are in need of serious attention and revision.

Fourthly, based on my analysis in Part IV of this report, there is no doubt about the constitutional authority of the federal government to enact a national education law. Provincial governments, on the other hand, would run into serious constitutional obstacles if they tried to deal more directly with the subject of Indian education.

Fifthly, I believe that Tradition and Education provides a great deal of useful information about the state of Indian education in Canada. I also believe that there is substantial experience, expertise and genuine commitment to improve the quality of Indian education in both the Education Secretariat of the AFN and the Education Branch of DIAND. It would be a shame to waste this happy conjunction of good information and good people. A joint enterprise to try to develop a national education statute would provide a real opportunity to improve the structure of education delivery systems and the quality of education for Indian students throughout Canada.

(8) CONTENTS OF NATIONAL INDIAN EDUCATION LAW

I would make a few recommendations about the possible contents of a national education law:

(a) Formal role for Indians – Jurisdiction

A national education law must create an explicit and formal role for Indians in the creation and administration of Indian education policy. The jurisdiction and control of Indians in this domain must be addressed and articulated as a central theme of a national education law.

An interesting comparison can be made between Indian education and minority language education, the latter being enshrined in section 23 of the Constitution Act, 1982. Sections 23(1) and (2) create constitutionally protected education rights for English and French minorities throughout Canada. Section 23(3) then states the circumstances in which the rights arise:

(3) The rights of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province

(a) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and

(b) includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.

Recently, the Supreme Court of Canada was called upon to interpret section 23(b). In Mahé v. Alberta (1990), 68 D.L.R. (4th) 69, a group of French parents in Edmonton argued that section 23 guarantees the right to 'the management and control' of a minority language school. The Court accepted this argument and articulated its reasons for doing so in these terms, at pp.88-90:

> [T]he words of s.23(3)(b) are consistent with and supportive of the conclusion that s.23 mandates, where the numbers warrant, a measure of management and control ...

> [T]he overall purpose of s.23 ... is to preserve and promote minority language and culture throughout Canada. In my view, it is essential, in order to further this purpose, that, where the numbers warrant, minority language parents possess a measure of management and control over the educational facilities in which the children are taught. Such management and control is vital to ensure that their language and culture flourish. It is necessary because a variety of management issues in education, e.g., curricula, hiring, expenditures, can affect linguistic and cultural concerns. I think it incontrovertible that the health and survival of the minority language and culture can be affected in subtle but important ways by decisions relating to these issues. To give but one example, most decisions pertaining to curricula clearly have an influence on the language and culture of the minority students.
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> Furthermore, as the historical context in which s.23 was enacted suggests, minority language groups cannot always rely upon the majority to take account of all their linguistic and cultural concerns. Such neglect is not necessarily intentional: the majority cannot be expected to understand and appreciate all of the diverse ways in which educational practice may influence the language of the minority.

This passage articulates, in my view, a compelling rationale for providing for a formal role for Indians in a national education law. The reasons for the fragility of minority languages and cultures in Canada, and the need to protect them through, in part, management and control of education by the minorities themselves, are as valid for Canadian natives across Canada as for francophones in Alberta or anglophones in Quebec. I would recommend, therefore, that any national education law be grounded in firm recognition and articulation of the need for Indians themselves to play a formal and dominant role in the creation and implementation of education policy. The best way to ensure this role is through clear statutory language dealing with Indian jurisdiction over Indian education.

(b) Structure of law -- 'Framework'

A national education statute should be more comprehensive, well-organized and rooted in the enunciation of key themes than the skeletal education provisions contained in sections 114-123 of the current Indian Act. The new statute should not, however, be a detailed code covering every aspect of Indian education. The new law should be developed as a 'framework' law, one that creates basic structures, enunciates important philosophical principles, and delineates major policy standards to serve as guides for the development and implementation of detailed education policy. In other words, the national law should attempt to strike a balance between, on the one hand, the need for the articulation of true national structures and standards and, on the other hand, the historical role and contemporary importance of local flexibility in some aspects of education policy-making and administration.

(c) Curriculum

A national education law should place particular emphasis on Indian education curricula. Indian education must be rooted in, and communicate to the young, the distinctive Indian history, traditions, culture, spirituality and values. Accordingly, an Indian education curriculum must be more than an adopted provincial curriculum. It must incorporate the principles around the distinctive socialization of children in Indian communities and it must reflect the community objectives in education. A national law should attempt to identify the key principles and enunciate appropriate standards in this important arena.

(d) Native languages

A national education law should place particular emphasis on the preservation of native languages. I agree with a statement in a paper prepared by the Manitoba Indian Brotherhood (Education Director -- Verna Kirkness) entitled Education for and About Children of Native Ancestry, at pp.8-9):

> Language is a very important aspect of culture. It is a valuable gift, a living thing, a special way of looking at the world. The education system over the years has failed to recognize the importance of native languages. Unless the native languages are taught in schools by sensitive teachers, and given the prestige that goes with recognition, the languages are condemned to a slow death. When a language dies, much of a way of living and thinking dies with it.

I would recommend that DIAND and the AFN undertake a serious study of the Kohango Reo program in New Zealand to see if it provides a model for the preservation of Indian languages and cultures in Canada. The central features of the Kohango Reo program -- an emphasis on pre-school Maori children, a broad notion of education encompassing language, culture, history and traditions, intensive Maori leadership of and participation in the program including roles for Maori parents, grandparents and elders, and strong government support including financial support -- have combined to produce a very successful education program that might be worthy of emulation in a Canadian context.

(e) National advisory committee

The national education law might include the establishment of a national advisory committee on Indian education. Such national bodies exist in both New Zealand and Australia. The purposes of the Canadian body would be to provide Indian educators and community representatives with an opportunity to participate in the development of education policies and to secure for the government the advice of these people at important points in the policy-making process.

(f) National Indian Education Institute

The national education law could create a National Indian Education Institute to serve as a focal point for long-range research and planning, teacher and administrator training, curriculum development and other matters. The federal Government recently established and funded the National Judicial Institute, an education facility for Canadian judges. A similar facility for Indian (or indeed all native) education might be considered.

(g) Resourcing

The national education law should deal with the question of resourcing the structures and programs established by the law. In that vein, I would suggest that what the Supreme Court of Canada said in Mahé v. Alberta (at p.95) about the resourcing of minority language schools is a useful yardstick in the context of Indian education.

> [T]he quality of education provided to the minority should in principle be on a basis of equality with the majority ... It should be stressed that the funds allocated for the minority language schools must be at least equivalent on a per student basis to the funds allocated to the majority schools. Special circumstances may warrant an allocation for minority language schools that exceeds the per capita allocation for majority schools.

The principles in this passage -- parity in the quality of education and recognition that additional financial support for minority education may be necessary to achieve the parity -- are already part of the education policy of the federal and provincial governments (see, for example, the Canada-British Columbia Master Tuition Agreement). A new national education law should explicitly affirm and further implement these principles.

James C. MacPherson

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